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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1400

COWLES BROADCASTING, INC. and
COWLES COMMUNICATIONS, INC.,

Petitioners,

v.

CENTRAL FLORIDA ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Cowles Broadcasting, Inc. and Cowles Communications, Inc., respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 12, 1979.

OPINIONS BELOW

The original opinion of the court of appeals, remanding the Federal Communication Commission's (hereafter "Commission") renewal of a television broadcast license to Petitioners, was rendered on September 25, 1978. The court of appeals amended this opinion by an order filed January 12, 1979. On the same date it issued a separate

order denying petitions for rehearing *en banc* filed by Petitioners and the Commission. It also issued a separate opinion *per curiam*. None of these actions has yet been reported officially.[1]

The Initial Decision of the Administrative Law Judge ("ALJ"), FCC 73D-62 (1973), is neither officially nor unofficially reported. App. at 54a. The Decision of the Commission is reported at 60 F.C.C.2d 372, 37 Rad. Reg. 2d 1487 (1976). App. at 139a. Its Memorandum Opinion and Order denying reconsideration and clarifying the Decision is reported at 62 F.C.C.2d 953, 39 Rad. Reg. 2d 541 (1977). App. at 289a. Its Memorandum Opinion and Order further denying reconsideration, FCC 77-446 (1977), is not officially reported but is found at 40 Rad. Reg. 2d 1627 (1977). App. at 302a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 25, 1978, and amended on January 12, 1979. Petitions for rehearing *en banc* were denied on January 12, 1979, and an opinion *per curiam* issued. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

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[1]To simplify the array of opinions, the court of appeals' September 25, 1978 opinion as modified by its January 12, 1979 Order shall be cited hereafter as "Opinion". The unamended opinion shall be cited hereafter as "Original Opinion". The order modifying the Original Opinion shall be cited hereafter as "Amendment." The separate January 12, 1979 *per curiam* opinion shall be cited hereafter as "Per Curiam". The Original Opinion is unofficially reported by Pike and Fischer Radio Regulation at 44 Rad. Reg. 2d 345 and by the Bureau of National Affairs Media Law Reporter at 4 Med. L. Rptr. 1503. App. at 1a. The Amendment, Per Curiam opinion and Order denying rehearing are reported at 44 Rad. Reg. 2d 1567. App. at 39a, 44a, and 53a.

QUESTIONS PRESENTED

Whether the decision of the court of appeals rejecting the Commission's balancing of "public interest" benefits in a broadcast license renewal proceeding:

1. Conflicts with the most recent decision of this Court, holding that in a license renewal proceeding (a) the preservation of continuity of meritorious service is an integral part of the statutory "public interest" standard, (b) the past performance of the incumbent is the most important factor in deciding whether to grant license renewal, and (c) in the weighing of policies under the "public interest" standard—a task delegated to the Commission—the continuity of meritorious service outweighs diversification of mass media ownership;

2. Wrongfully concludes that the Commission did not explain adequately its decision and is wrongfully premised on a misreading of the Communications Act of 1934, as amended, the Commission's regulations and policies, and the record; and

3. Leaves in a state of complete confusion the statutory "public interest" standard and the renewal expectancies of incumbent licensees.

STATUTORY PROVISIONS INVOLVED

The Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.*, and, particularly, Sections 307(d)[2] and 309(a)[3] are pertinent in this proceeding.

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[2]Section 307(d) provides that broadcast licenses can be granted for a three year term and renewed for additional three year terms upon a finding that the "public interest, convenience and necessity would be served thereby." App. at 312a.

[3]Section 309(a) provides that applications, such as renewal applications, may be granted upon a determination that "the public interest, convenience, and necessity will be served." App. at 313a.

STATEMENT OF THE CASE

A broadcast station must renew its license every three years. On October 31, 1969, Cowles Broadcasting, Inc. ("CBI")[4], one of the Petitioners, applied for renewal of its license to operate WESH-TV, Channel 2, Daytona Beach-Orlando, Florida. Central Florida Enterprises, Inc. ("Central"), Respondent, tendered a competing application for a construction permit to establish a new commercial television broadcast station on WESH-TV's Channel 2. Unlike CBI, Central's application did not provide for auxiliary studios in the Orlando area. Because the applications were mutually exclusive, a comparative renewal hearing was required to determine which applicant would best serve the "public interest, convenience, and necessity." 47 U.S.C. §§307(d), 309(a). The court of appeals characterized this proceeding as a "typical comparative renewal case." App. at 2a.

At the hearing, the "standard comparative issue"—as it is applicable to comparative license renewal proceedings—was addressed to determine which of the applicants would provide the "best practicable service" and which would provide the broadest diversification of mass media ownership. CBI's past broadcast record was examined thoroughly. Numerous local residents and community leaders expressed particular satisfaction with CBI's performance, and the record does not contain a single complaint about the station's service. App. at 136a, 231a. The challenger, Central, elected not to introduce evidence concerning its proposed programming. Numerous other subsidiary issues were raised, two of which are relevant

[4] Cowles Florida Broadcasting, Inc. filed the renewal application at issue. During this proceeding it amended its Articles of Incorporation to change its name to Cowles Broadcasting, Inc.

here: (1) the use of dual studios under the Commission's rules and (2) the relevancy, if any, of certain mail fraud allegations made against other completely separate subsidiaries of CBI's parent corporation, Cowles Communications, Inc. ("CCI").[5]

On December 7, 1973, the ALJ granted CBI's renewal application and denied Central's competing application. The ALJ concluded that CBI merited a "distinct preference" under the "best practicable service" criterion based primarily on its past performance, which outweighed Central's advantage because of diversification of mass media ownership.[6]

On July 30, 1976, the Commission affirmed the ALJ's decision, but noted that the ALJ's findings did not adequately reflect the "outstanding" quality of CBI's past performance and community involvement. App. at 228a. Following its own careful examination of the record, the Commission concluded that CBI's past performance deserved a rating of "superior", entitling it to a "plus of major significance." The Commission affirmed the ALJ's conclusion that CBI's pref-

[5] See App. at 57a for the full text of the issues.

[6] Central had no other media interests, and CCI, at that time, was the licensee of a television station and two radio stations in Des Moines, Iowa. The radio stations were subsequently divested. CCI was the parent of the licensee of two radio stations in Memphis, Tennessee, which were also subsequently divested, and it owned stock in The New York Times Company. The ALJ (and later the Commission) found CCI's broadcasting interests of "little decisional significance" because they were remote from the Daytona Beach area and were not even dominant in their own communities, and because CBI had substantial management autonomy. The ownership of The New York Times Company stock was deemed insignificant because CCI did not have a controlling interest.

erence for best practicable service outweighed Central's preference under diversification. It also agreed with the ALJ that neither the "main studio" nor the "mail fraud" issues constituted grounds for denying the license renewal to CBI.[7]

On January 4, 1977, in its supplementary opinion, the Commission clarified its finding that CBI's past performance was "superior", explaining that the level of service provided by WESH-TV was "sound, favorable, and *substantially above* a level of mediocre service which might just minimally warrant renewal." App. at 294a (emphasis added). The Commission expressly avoided the word "superior" out of concern that such a "comparative" term would entitle only a small percentage of television licensees to renewal, thereby denying the legitimate renewal expectancies of the vast majority of meritorious broadcasters. App. at 295a.[8]

Central appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit pursuant to section 402(b)(1) of the Communications Act, 47 U.S.C. §402(b)(1). The court of appeals vacated the Commission's orders on September 25, 1978, and remanded the case, concluding that the Commission erred in according more weight to the finding that CBI would provide the best practicable service based upon its substantial past performance than to the finding that

[7] These issues are discussed *infra* at pp. 17-19.

[8] Citizens Communications Center, National Citizens Committee for Broadcasting and the National Black Media Coalition (*amici* before the court of appeals) then petitioned for reconsideration. The Commission held that they lacked standing, but considered the merits of the petition nonetheless and denied it on June 30, 1977.

Central was entitled to a "preference" because of diversification of mass media ownership.

Both the Petitioners before this Court and the Commission sought rehearing *en banc*, on the grounds that: (1) the appellate court's decision was inconsistent with the decision of this Court in *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (*"FCC v. NCCB"*), and with appellate court precedent on licensing criteria applicable in a license renewal proceeding; (2) the court of appeals, contrary to the intent of Congress, exceeded its scope of review in substituting its policy judgment for the mandated discretionary judgment of the Commission; and (3) the decision to remand to the Commission on certain special issues was premised on a misreading of the record.

The court of appeals denied these petitions on January 12, 1979, in a separate opinion *per curiam*. The appellate court also amended its September 25 Opinion *sua sponte* to acknowledge this Court's holding in *FCC v. NCCB* by including a quote from that opinion and by deleting certain incorrect policy directions and statutory interpretations. App. at 39a, Amendment. As the following discussion will demonstrate, however, the appellate court's decision is still in conflict with *FCC v. NCCB*.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' OPINION IS FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S DECISION IN *FCC v. NCCB.*

This Court has recognized—and recently reaffirmed—that a licensee who has given meritorious service has

> a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and *should not be destroyed absent good cause.*

FCC v. NCCB, 436 U.S. at 805 (emphasis added). This policy is based on this Court's recognition that, in reliance on their legitimate renewal expectancy, incumbent broadcast licensees, including Petitioners, will invest in the technology that brings quality service, experiment with innovative programming, and provide local and informational programs.

The appellate court's belated discovery of this Court's decision—completely ignored in the Original Opinion although brought to its attention—does not change the fundamental inconsistency of its Opinion—even as modified—with this Court's recognition that "existing licensees [are evaluated] on a somewhat different basis from new applicants."[9] *Id.* at 810-11.

Even as modified, the court of appeals' opinion conflicts with *FCC v. NCCB* in three fundamental ways:

[9] The Amendment correctly deleted the erroneous statement in the Original Opinion that a distinction between initial and renewal proceedings would not be "lawful without an amendment to the hearing provisions of the Communications Act" (App. at 21a, 43a), but ignored the substantial legislative history in support of the distinction which was cited by this Court in *FCC v. NCCB*, 436 U.S. at 811 n.31.

(1) it denigrates the public interest benefit in "a policy of avoiding undue disruption of existing service" (*id.* at 782); (2) it undermines the significance of "past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation" (*id.* at 806); and (3) it supplants the Commission's policy discretion by requiring that greater weight be accorded the factor of diversification (*id.* at 810). Furthermore, the Opinion directly contradicts the legislative history of the Communications Act, prior decisional law, and longstanding administrative practice—all of which were cited with approval by this Court.

A. The Court of Appeals Wrongfully Refused to Recognize the Importance This Court has Accorded Continuity of Meritorious Service as a Relevant Factor in the "Public Interest" Determination.

This Court has explained that continuity of meritorious service furthers the "public interest" both by "bringing proven broadcast service to the public" and by "rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance." *Id.* at 805. Initially, the appellate court erroneously characterized the Commission's consideration of continuity of service as an "embarrassingly clear" presumption of renewal. App. at 23a, Original Opinion. Only after Petitioners and the Commission pointed out the blatant inconsistency with *FCC v. NCCB* in requests for rehearing *en banc*, did the appellate court begrudgingly concede:

> This, we admit, appears at least a plausible construction of the "public interest". App. at 49a, Per Curiam.

In finding a congressional policy clearly recognized by this Court to be "plausible", the court of appeals has both glossed over the obvious conflict between its Original Opinion and *FCC v. NCCB*[10] and sidestepped the basic issue of the significance of past performance as a noncomparative criterion, irrespective of its predictive value. In complete disregard of this Court's unambiguous language,[11] the appeals court left as "open and difficult questions" whether "a 'substantial' past record would be a factor weighed in the incumbent's favor . . . [in order] to *promote security* directly and to *induce investment.*" App. at 41a, Amendment (emphasis added).

[10]The Amendment now incorporates a quoted passage from *FCC v. NCCB* in an apparent attempt to remedy this glaring defect (App. at 42a, Amendment), but this reference merely highlights the contradiction as the quoted passage stands isolated, unexplained, and in conflict with the rest of the appellate court's decision. Moreover, although intimating that this Court's construction of "public interest" may be "plausible", the appeals court clearly reserves its judgment by claiming that the Commission did not adequately explain its rationale nor would it be permitted to present such a rationale for the first time to the appellate court. App. at 50a, Per Curiam. In fact, as this Court has recognized, "[T]he Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest." *FCC v. NCCB*, 436 U.S. at 805. Furthermore, in its decision and again on reconsideration, the Commission articulated this rationale by emphasizing "renewal expectancies" and stressing that the license renewal process should not be used to restructure the broadcast industry. App. at 237a, 295a. The Commission also took notice of the ALJ's reliance on the importance of industry stability. App. at 133a, 210a.

[11]"We agree with the Court of Appeals that '[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse effect on the provision of broadcasting service to the public.' [Citations omitted.] *Private losses that result in discouragement of investment in quality service have such an effect.*" *FCC v. NCCB*, 436 U.S. at 805-06 n.24 (emphasis added).

A policy which fails to take into full account the actual performance of the licensee and the need to preserve continuity of service is clearly not in the public interest. Investment in quality programming and the freedom to innovate and to take the risks inherent in informational (news and public affairs) and local programming depend on the licensee's stability and the avoidance of unnecessary disruption. The Communications Act does not require that these "public interest" objectives be ignored,[12] and Congress clearly did not intend such a result.[13] Prior appellate court decisions

[12]The appellate court's recitation of statutory provisions that support its bias against an incumbent's expectancy of renewal (*e.g.*, 47 U.S.C. §301 "no . . . license shall be construed to create any right beyond the terms, conditions, and periods of the license" App. at 4, Original Opinion n.4) is directly contradicted by this Court in *FCC v. NCCB:* "The fact that a licensee does not have any *legal* or *proprietary* right to a renewal does *not* mean, however, that the Commission cannot take into account the incumbent's past performance in deciding whether renewal would serve the public interest." *Id.* at 806 n.25 (emphasis added).

[13]Congress expressly amended the Communications Act in 1952 to enable the Commission to apply a different "public interest" standard to renewal applicants. Prior to 1952, §307(d) provided that decisions on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." *See* Communications Act of 1934, 47 U.S.C. §307(d), 48 Stat. 1084. In 1952 the section was amended to provide simply that renewal "may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby." Communications Act Amendments of 1952, 66 Stat. 714 §5. The House Report explained that the previous language "is neither realistic nor does it reflect the way in which the Commission actually has handled renewal cases," H.R. Rep. No. 1750, 82d Cong., 2d Sess. 8 (1952), and the Senate Report specifically stated that the Commission has the "*right and duty* to consider, in the case of a station which has been operating and is applying for a renewal, the overall performance of

[footnote continued]

consistently have recognized this distinction between initial and renewal proceedings.[14]

B. The Limitations Placed by the Court of Appeals on the Relevancy of Past Performance Are Directly Contrary to This Court's Determination of Past Performance as "The Most Important Factor" in Renewal Decisions.

By limiting the relevance of the incumbent's past performance to mere evidence of the *credibility* of the licensee's renewal *proposals* and by establishing a restrictive test of "superior" performance, the court of appeals has undermined the statutory "public interest" standard as defined by this Court in *FCC v. NCCB*, 436 U.S. at 806, 810. This Court clearly stated:

> [T]he Commission has long considered the past performance of the incumbent as *the most important factor* in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation.

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that station against the broad standard of public interest, convenience, and necessity." S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951) (emphasis added). *See FCC v. NCCB*, 436 U.S. at 811 n.31. The court of appeals distorts this legislative history. *See* App. at 3a, Original Opinion, n.4.

[14] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("legitimate renewal expectancies [are] implicit in the structure of the Act"); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213, *clarified*, 463 F.2d 822 (D.C. Cir. 1972) ("incumbent licensees should be judged primarily on their record of past performance"); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 702 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) ("when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license."); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 & n.9 (D.C. Cir. 1976).

436 U.S. 806 (emphasis added). Yet the court of appeals berated the Commission for judging "incumbents largely on the basis of their broadcast record, to which there will be nothing comparable on the side of a challenger in any case" (App. at 31a, Original Opinion (footnote omitted)) and for the "wholly *noncomparative* assessment of Cowles' past performance." App. at 20a, Original Opinion (emphasis added).

The appellate court's reliance on the comparative criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereafter *"1965 Policy Statement"*) to guide the balancing and outcome of the renewal proceeding is misplaced and contrary to the critical distinction between initial and renewal licensing implicit in the structure of the Communications Act. App. at 20a-23a, 28a, 34a, 40a, Opinion.[15] According "equal footing" in a *renewal* proceeding to the criteria in the *1965 Policy Statement*—which were adopted to govern *initial* licensing proceedings—is also directly contrary to the holding in *FCC v. NCCB*. The *1965 Policy Statement* is necessarily concerned with structure and proposals, not with performance and continuity, and if applicable, would not protect the renewal expectancies of broadcasters who have rendered meritorious service. Challengers can, and will, easily structure themselves to appear superior to the renewal applicant on these initial licensing criteria, especially in organizational matters and

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[15] Footnote 1 to the *1965 Policy Statement* provides:

> This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.

1 F.C.C.2d at 393.

promises of performance. The renewal applicant lacks such structural flexibility. Its full hearing rights, guaranteed by this Court,[16] can only be preserved by due consideration and emphasis on its past broadcast record.

The court of appeals attempted to limit further the Commission's consideration of past performance by providing that only "superior" performance is "highly relevant to the *comparison*, and might be expected to prevail absent some clear and strong showing by the challenger under the comparative factor." App. at 37a (emphasis added). First, the Commission and not the courts is charged with the responsibility for establishing renewal standards.[17] More importantly, as the Commission's supplementary decision sought to explain, rigid adherence to a notion of "superior" performance would mean that only a small percentage of all broadcasters would be entitled to renewal despite clearly demonstrated "meritorious" programming. The "superior" test is inherently contrary to the principle that broadcasters have legitimate renewal expectancies

[16] *See generally Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[17] In *Citizens Communications Center v. FCC*, 463 F.2d 822 (D.C. Cir. 1972), the court of appeals noted that "superior" performance would be entitled to a "plus of major significance." The court of appeals now attempts to transform and elevate this dictum to a threshold of relevance which would require that the Commission demonstrate "superior" performance in order to justify the renewal on the basis of the incumbent's record. The illustrative criteria set forth in *Citizens Communications Center, id.* at 823, apparently now have become legal prerequisites, requiring conformance by incumbent licensees. App. at 36, Original Opinion, n.93.

under the Communications Act, and works to defeat the public interest in continuity and stability. *FCC v. NCCB*, 436 U.S. at 805.

C. By Reordering the Balance Between Diversification of Mass Media Ownership and Meritorious Past Performance, The Court of Appeals Improperly Substituted its Policy Judgment for That of the Commission.

The court of appeals' holding that "it was unreasonable then to accord the diversification finding 'little decisional significance,' " (App. at 30a, Original Opinion) was not in keeping with this Court's conclusion that "diversification of ownership [is] a factor of less significance" than past performance. *FCC v. NCCB*, 436 U.S. at 810. Moreover, by rejecting the weight the Commission gave to diversification of ownership, the appellate court has usurped the weighing task that Congress has delegated to the Commission. *Id.* The weight the Commission accorded diversification was fully consistent with this Court's most recent articulation of this issue:

> Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the "proven product" and grant renewal if the incumbent has rendered meritorious service.[18]

[18] 436 U.S. at 806. In an attempt to avoid this obvious inconsistency, the court of appeals said in its Amendment that it objected only to the "*manner* in which the Commission analyzed the concededly relevant factor, not intending to prescribe the *weight* which the Commission generally should accord media concentration in the context of comparative renewal hearings." App. at 43a (emphasis added). Nonetheless, the court of appeals concluded that the Commission's reconstruction of the diversification criteria

[footnote continued]

By rebalancing the scales and assigning a higher value to the media diversification factor, the appellate court has intruded impermissibly into the administrative decision-making process. Such intrusion is improper in any circumstance, but it is especially so here where the appellate court has directed a result which is squarely at odds with the established law. Its attempt to substitute its policy judgment for that of the Commission conflicts in principle with this Court's clear command that the courts adopt a deferential standard of judicial review. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). "The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Furthermore, "it is the Commission, not the courts, which must be satisfied that the public interest will be served." *FCC v. WOKO, Inc.*, 329 U.S. 223, 225 (1946).

"belittl[ed]" Central's advantage (App. at 26a, Original Opinion), that the Commission "*seriously undercut* the utility of the diversification criteria" (App. at 28a, Original Opinion (emphasis added)), and that the *1965 Policy Statement* established that "related media interests anywhere in the nation are quite material" (*id.* (emphasis added)). Each of these objections goes to the weight accorded diversification and is inconsistent with this Court's holding that "diversification of ownership [is] a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing." *FCC v. NCCB*, 436 U.S. at 810.

II.

BECAUSE THE COURT OF APPEALS MADE SERIOUS ERRORS OF LAW AND FACT, ITS DECISION IS CLEARLY WRONG.

The appellate court's decision is plainly wrong on several counts: It wrongly contended that the Commission did not adequately explain its findings and rationale; it misconstrued the statute, legislative intent and the Commission's regulations; and it misread the record.

(1) Shifting the emphasis to sidestep the obvious conflict of its Original Opinion with *FCC v. NCCB*, the court of appeals redirected its attack on the Commission's "wholly unintelligible" balancing of its findings and "administrative feel." In fact, the ALJ and the Commission explained fully the findings and how they were reconciled and weighed and then, on reconsideration, the Commission explained further its rationale. The appellate court may disagree with the Commission's rationale, but it cannot pretend that it was not set forth expressly by the Commission. App. at 207a-238a; 294a-299a; 307a-309a.

(2) The appellate court ignored the statutory distinction between initial and comparative hearings, misinterpreted the 1952 amendment and its legislative history (*supra* note 13), and repeatedly misapplied the Commission's *1965 Policy Statement*.

It further misread the Commission's rule on television "main studios," 47 CFR §73.613(a).[19] The court of appeals found a "plain violation" of the rule—a conclusion which far exceeded that drawn by the Com-

[19] Section 73.613 provides, in part: "Main studio location. -- (a) The main studio of a television broadcast station shall be located in the principal community to be served . . . ."

mission—and directed the Commission to reconsider this matter.[20] In so doing, the appellate court mistakenly confused the clear and specific main studio rules for radio stations, 47 CFR §§73.30, 73.210,[21] with the ambiguous and undefined main studio rule for television stations, 47 CFR §73.613(a). The court of appeals also contradicted its own statement that "the choice of remedies and sanctions for violations of Commission rules 'is a matter wherein the Commission has broad discretion.' " App. at 24a, Original Opinion. In its detailed review of the issue, the Commission considered the ambiguity of the television main studio rule during the license period; the lack of interpretive precedent; the absence of requirements for maintaining records of program origination; the lack of any complaints about the station's operation; and the meritorious service to the city of license, Daytona Beach.

(3) Furthermore, the court of appeals misread the record concerning Central's allegations about "common officers" and the curtailment of the inquiry in the so-called mail fraud issue, erroneously concluding that the Commission failed to fully address these points. In fact, however, as Petitioners pointed out in their Petition for Rehearing, the Commission thoroughly addressed this issue and resolved it in favor of Petitioners. While Central failed to perfect the issue of common officers, raising it for the first time on appeal, Petitioners nonetheless pointed out that the ALJ had in fact reviewed the evidence and made findings on this point. They also pointed out the confused state of Central's pleadings, its failure to articulate any harm and its failure to seek administrative and judicial review of the ALJ's decisions.

[20] When CBI acquired WESH-TV in 1966 the station already had its main studio in Holly Hill, just outside Daytona Beach, and an auxiliary studio in Winter Park, just outside Orlando. Neither studio was closed by CBI, nor was there a physical "move" of either studio. Rather, the issue concerned the use of each studio. The Commission did not accord significance to this issue.

[21] These rules provide that the main studios for AM and FM stations should be located in the city of license and that a majority of a radio station's programs, or two-thirds of its non-network programs, must originate from the main studio.

III.

IN ITS ATTEMPT TO OBFUSCATE THE INCONSISTENCIES, THE COURT OF APPEALS' OPINION LEAVES IN UTTER CONFUSION THE MEANING OF THE "PUBLIC INTEREST" STANDARD, THE COMMISSION'S STATUTORY RESPONSIBILITIES, THE OBLIGATIONS AND RENEWAL EXPECTANCIES OF ALL INCUMBENT BROADCAST LICENSEES, AND THE APPROPRIATE COURSE OF ACTION FOR PETITIONERS.

The court of appeals has characterized this proceeding as "a typical comparative renewal case" and has boldly asserted that "the state of administrative practice in Commission comparative renewal proceedings is unsatisfactory." App. at 2a-3a, Original Opinion. With its Original Opinion and its ambiguous, confusing and internally contradictory Amendment, the court of appeals has created a state of utter confusion. Incumbents do not know whether they have legitimate renewal expectancies and, if so, what such expectancies encompass. They do not know how the past broadcast record and diversification of ownership will be weighed or whether avoidance of disruption and continuity of service are relevant factors. This climate of confusion is hardly conducive to inyestment in meritorious service.

In the semantical wake of the court of appeal's decision, with the simultaneous use of the words "meritorious" and "superior" and the constantly changing

characterization of the WESH-TV broadcast record, Petitioners do not know what evidence should be adduced on remand or by what standards CBI's renewal application will be judged.

CONCLUSION

Thus, after nine years of administrative and judicial process, including three decisions of the Commission awarding a license renewal to CBI, Petitioners are now faced with the prospect of further hearings without any clear ground rules. This situation is unsettling, not only to Petitioners, but also to every broadcaster which must file for renewal of its license. For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted for the purpose of clarifying the law and providing guidance to licensees.

Respectfully submitted,

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March 13, 1979

Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1400

COWLES BROADCASTING, INC. and
COWLES COMMUNICATIONS, INC.,

Petitioners,

v.

CENTRAL FLORIDA ENTERPRISES, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1742

CENTRAL FLORIDA ENTERPRISES, INC., APPELLANT

v.

FEDERAL COMMUNICATION COMMISSION, APPELLEE

COWLES BROADCASTING, INC., INTERVENOR

Appeal from an Order of the
Federal Communications Commission

Argued 6 June 1978

Decided 25 September 1978

Joseph F. Hennessey with whom *Lee G. Lovett* and *Richard C. Rowlenson* were on the brief, for appellant.

Daniel M. Armstrong, Associate General Counsel with whom *Robert R. Bruce*, General Counsel and *Jack David Smith*, Counsel Federal Communications Commission was on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert A. Marmet with whom *Harold K. McCombs, Jr.* was on the brief, for Intervenor, Cowles Broadcasting, Inc.

Before: ROBINSON and WILKEY, *Circuit Judges*, and FLANNERY, *United States District Judge* for the United States District Court for the District of Columbia

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Appellant, Central Florida Enterprises, Inc. (Central), appeals a decision and accompanying orders by the Federal Communications Commission (Commission) denying its application for a construction permit for a new commercial television station to operate on Channel 2 in Daytona Beach, Florida, and granting the mutually exclusive application for renewal of license to Intervenor Cowles Florida Broadcasting, Inc. (Cowles).[1] Appellant contends that the Commission acted unreasonably and without substantial record support in preferring Cowles' renewal application. We agree, vacate the Commission's orders, and remand for further proceedings.

I. ISSUES IN COMPARATIVE RENEWAL PROCEEDINGS, PAST AND PRESENT

What is at issue here is the validity of the process by which the competing applications of Central and Cowles were compared and the adequacy of the Commission's articulated rationale for its choosing to renew Cowles' license. This may well be a typical comparative renewal

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372 (1976), *reconsideration denied and clarified*, 62 F.C.C.2d 953 (1977), *reconsideration denied*, 40 RAD. REG. 2d 1627 (1977) (P-H). The jurisdiction of this court is properly invoked pursuant to 47 U.S.C. § 402(b) (1970).

case, hence the careful scrutiny we give the Commission's procedure and rationale herein.

Aside from the specific facts of this case, there is other evidence indicating the state of administrative practice in Commission comparative renewal proceedings is unsatisfactory.[2] Its paradoxical history reveals an ordinarily tacit presumption that the incumbent licensee is to be preferred over competing applicants.[3] Because the Federal Communications Act fairly precludes any preference based on incumbency *per se*,[4] the practical

[2] *See generally Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, 705-17 (D.C. Cir.) (Bazelon, C.J.) (voting to grant rehearing en banc), *cert. denied*, 423 U.S. 926 (1975); *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1206-10 (D.C. Cir. 1971), *clarification granted*, 463 F.2d 822 (1972); *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 435-42 (1976) (Commissioner Robinson, dissenting); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 Va.L.Rev. 471 (1975).

[3] *See* note 17 *infra*.

[4] The Communications Act of 1934 included language expressly referring the decision to renew a license to "the same considerations and practice which affect the granting of original applications," ch. 652, § 307(d), 48 Stat. 1084 (1934). Apparently to preclude the inference that an incumbent could not adduce evidence of its past broadcast record, Congress in 1952 deleted the language subjecting renewal applicants to "the same considerations and practice" as original applicants and substituted the present language subjecting all applications to the standard of "public interest, convenience, and necessity," 47 U.S.C. § 307(d) (1970). *See Citizens Communications Center* v. *FCC*, 447 F.2d at 1206-07 and n.13. *But see Report of the Federal Communications Commission to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives Re the Comparative Renewal Process*, Joint Appendix (J.A.) at 172, 182 (1976) [hereinafter cited as *Report*] (suggesting that the 1952 amendment may have codified the Commission's informal presumption of renewal). The Communications Act contains numerous other passages suggesting

bias arises from the Commission's discretionary weighing of legally relevant factors.[5] Of course, the general preference, and *a fortiori* the disposition in any given instance, may be a lawful exercise of the Commission's "substantive discretion." However, it is the judicial function to insure that such discretionary choices as are entailed in these proceedings are rigorously governed by traditional principles of fairness and administrative regularity.

Comparative analysis is implicit in any scheme of allocation and has always been at least formally a consideration in broadcast licensing. The procedural setting for such a comparative review is the licensing hearing provided by Section 309(e) of the Communications Act.[6] The Supreme Court held in *Ashbacker Radio Corp.* v. *FCC*[7] that under Section 309(e) where two or more applications are mutually exclusive there must be a joint comparative hearing. This court had occasion to elaborate what is entailed by such a "full hearing" in *Greater Boston Television Corp.* v. *FCC*:

> [T]he findings must cover all the substantial differences between the applicants and the ultimate conclusion must be based on a composite consideration of the findings as to each applicant.[8]

Although *Ashbacker* dealt with two original applications, this court and the Commission have consistently held that the doctrine governs renewal proceedings as well.[9]

A less tractable matter has been the question of the substantive criteria to assure a fair comparison. The development of those criteria has been committed largely to the discretion of the Commission, with occasional and quite general guidance from the courts, as in *Greater Boston, supra*. The standards, evolved gradually over the course of the Commission's comparative proceedings, were reviewed and restated in the *1965 Policy Statement on Comparative Broadcast Hearings.*[10] Logically, criteria for comparison should be derived from and relate to the defined *objectives* of the comparative hearing. The Commission so proceeded, identifying in the Policy Statement the primary *objectives* of the comparative hearing as "the *best practicable service* to the public" and the "*maximum diffusion of control* of the media of mass communication."[11] The principal factors relevant to the "best practicable service" issue were the extent of participation of owners in station management, programming proposals, past broadcast record, technical capacity, and character.[12] Diversification of ownership of the mass media was described as being "of primary significance."[13] Further, upon an appropriate showing, the parties could raise any other relevant factors.

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that the grant of a license creates no preferential rights in the incumbent, providing, *inter alia*, that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license," 47 U.S.C. § 301; that an applicant waives any claim to a frequency "because of the previous use of the same," 47 U.S.C. § 304; that no license granted "shall be for a longer term than three years," 47 U.S.C. § 307(d); and that a license does "not vest in the licensee any right . . . in the use of the frequencies . . . beyond the term thereof," 49 U.S.C. § 309(h) (1970). *See also FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

[5] *See* pp. 22-23 *infra*.

[6] 47 U.S.C. § 309(e) (1970).

[7] 326 U.S. 327, 333 (1945).

[8] 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (footnote omitted).

[9] *See Citizens Communications Center* v. *FCC*, 447 F.2d at 1211.

[10] 1 F.C.C.2d 393 (1965) [hereinafter cited as *1965 Policy Statement*].

[12] *Id.* at 395-98.

[11] *Id.* at 394.

[13] *Id.* at 395.

The applicability of the Commission's usual comparative criteria to comparative *renewal* proceedings has been uncertain. The fact of incumbency without more would appear legally irrelevant under the statute.[14] Although the *1965 Policy Statement* pretermitted "the somewhat different problems raised when an applicant is contesting with a licensee seeking renewal of license," [15] the Commission subsequently held that the 1965 Policy Statement "should govern the introduction of evidence in this and similar proceedings where a renewal application is contested." [16] The weight given to the 1965 criteria would still depend on the facts of each case.

Despite the apparent statutory assurance of a free-wheeling inquiry into the relative merit of challenger and incumbent licensee, the history of Commission practice reveals a strong preference for renewal.[17] Further, until fairly recently, such choices by the Commission were routinely affirmed by this court.[18] This general phenomenon has been rationalized into what we have called on occasion "a renewal expectancy." [19] The question arises, material in this case, to what extent such an expectancy is compatible with the full hearing guaranty of Section 309(e). This was essentially the question we confronted

[14] *See* note 4 *supra.*

[15] *1965 Policy Statement, supra* note 10, at 393 n.1.

[16] *Seven (7) League Productions, Inc. (WIII),* 1 F.C.C.2d 1597, 1598 (1965).

[17] *See Citizens Communication Center* v. *FCC,* 447 F.2d at 1207-09; *Wabash Valley Broadcasting Corp. (WTHI-TV),* 35 F.C.C. 677 (1963); *Hearst Radio, Inc. (WBAL),* 15 F.C.C. 1149 (1951).

[18] *See Citizens Communications Center* v. *FCC,* 447 F.2d at 1208 n.23.

[19] *See id.* at 1213 n.35; *Greater Boston Television Corp.* v. *FCC,* 444 F.2d at 854, 858.

in *Citizens Communication Center* v. *FCC.*[20] There we struck down the Commission's 1970 *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants* [21] because it foreclosed the fully comparative inquiry mandated by the statute as construed in *Ashbacker.* Under that Policy Statement, if there were a showing of past "substantial service," a licensee would be renewed without consideration of comparative issues. *Citizens* thus stands for the proposition that "the Commission may not use renewal expectancies of incumbent licensees to shortcircuit the comparative hearing." [22]

We did note the relevance of the incumbent's past performance:

> We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a licensee. . . . At the same time, superior performance should be a plus of major significance in renewal proceedings. The Court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.[23]

Thus expectations are confined to the likelihood that a showing of superior performance will be sufficient, in light of the comparative criteria, to carry the day in the overall public interest inquiry.

[20] 447 F.2d 1201 (1971).

[21] 22 F.C.C.2d 424 (1970).

[22] *Fidelity Television, Inc.* v. *FCC,* 515 F.2d at 705, 709 (Bazelon, C. J.) (voting for rehearing en banc).

[23] *Citizens Communication Center* v. *FCC,* 447 F.2d at 1213 and n.35.

II. The Course of the Litigation

Intervenor Cowles has operated its station, WESH-TV, on Channel 2 in Daytona Beach since it purchased the station in 1966. On 31 October 1969 Cowles filed its application for renewal of license. Central submitted its competing application for a construction permit for a new television station to operate on the same channel on 2 January 1970. The two applications were set for hearing by Commission order released 10 March 1971, and redesignated by orders released 20 August 1971 and 24 February 1972.

In addition to inquiry into diversification of media ownership and "best practicable service," which comprise the customary comparative issues, certain special issues were designated for hearing. These were (a) whether contrary to Commission regulation, Cowles had moved its main studio without prior Commission approval; and (b) whether alleged mail fraud by five related corporations supported inferences adverse to Cowles' character.[24] Following extensive findings, the Administrative Law Judge (ALJ) concluded that renewal of Cowles' license would best serve the public interest.[25] By a 4-3 vote the Commission affirmed with certain modifications.[26]

The facts in this case are essentially undisputed, and will be recounted only incidentally to our review of the Commission's decision.

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[24] Certain other designated issues, dealing with engineering and financial matters, are not at issue here.

[25] Cowles Florida Broadcasting, Inc., F.C.C. 73D-62 (Released 7 Dec. 1973) [hereinafter cited as *Initial Decision*], J.A. at 78.

[26] *See* note 1 *supra*.

A. *The Initial Decision*

1. *Designated Issues.*

a. The Main Studio Move

Commission rules require that "[t]he main studio of a television broadcast station shall be located in the principal community to be served."[27] WESH-TV's city of assignment is Daytona Beach, and the station had always had a studio just outside the city at Holly Hill. In addition, WESH-TV maintained "auxiliary" studios in Winter Park, just outside Orlando. Since 1960, the station had been authorized to identify as a Daytona Beach-Orlando station, although the Commission stressed that Daytona remained the city of assignment and "principal city." The rule prescribing the location of the "main" studio, unlike the analogous rules governing radio stations,[28] contains no definition of "main" studio and there is little clarifying precedent.

Still, the ALJ found "inescapably" that "Cowles treats its Winter Park [Orlando] facility as its principal place of business."[29] Because there had been an unauthorized move of the "main studio" contrary to rule, the ALJ gave Cowles a comparative demerit.[30] However, the demerit was not given much weight in light of what the ALJ considered to be mitigating factors. First, the ALJ stressed that there was "little evidence that the move

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[27] 47 C.F.R. 73.613 (1977).

[28] 47 C.F.R. 73-210 (1977) (FM stations); 47 C.F.R. 73.30 (1977) (AM stations).

[29] *Initial Decision* ¶ 181, J.A. at 130.

[30] *Id.* ¶ 203, J.A. at 136.

resulted from a deliberate corporate decision to move the main studio in defiance of the Commission's rules." Rather, a "series of changes" responding to the "commercial lure" of Orlando, resulted in a "de facto move of the main studio." [31] Second, the ALJ concluded that "the unauthorized move had not resulted in the downgrading of service to the community of assignment which [the rule] is designed to prevent." [32]

b. Mail Fraud

Cowles is a wholly owned subsidiary of Cowles Communications, Inc., (CCI). During the license period CCI also published Look Magazine and owned five other subsidiaries, each in the business of obtaining magazine subscriptions. The five subsidiaries conducted so-called "paid during service" (PDS) operations in which subscribers paid installments of the purchase price over the life of the subscription.

After a few years, complaints arose of improper sales and collection practices by the PDS companies. When CCI became aware of the problem, it promulgated a code of practice for the subsidiaries to cure the abuses. Despite these efforts, the practices continued and by the fall of 1969 the PDS companies were under investigation by various state and federal agencies. In 1970, after being informed that the Justice Department intended to investigate the entire PDS industry, CCI initiated negotiations which resulted in *nolo contendre* pleas by the five PDS subsidiaries to fifty counts of mail fraud, and a consent decree against the five companies, guaranteed by CCI, enjoining specific sales and collection practices.

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[31] *Id.* ¶ 182, J.A. at 131.

[32] *Id.* ¶ 183, J.A. at 131.

With respect to Cowles' parent, CCI, the ALJ reached conclusions that he characterized as "harsh." [33] He found that CCI acquired operations which "it must have realized" would be inclined to massive fraud. CCI's supervision was "spotty" and "ineffectual," its internal investigation coming "late in the day" when it recognized "that various governmental agencies were about to call it to account." It was "inconceivable that it could have . . . been unaware" of such corruption "unless it chose to be." [34]

The ALJ concluded, however, that Cowles was insulated from these "harsh" findings concerning its parent. Although the ALJ supposed such evidence of fraud would probably disqualify an original applicant, the findings in this case were not "decisionally material" in light of Cowles' broadcast record which better predicts future performance. Consequently, it was "unnecessary to attempt to draw inferences from the nonbroadcast conduct of CCI and its non-broadcast subsidiaries;" and "no conclusions adverse to the character qualifications of [Cowles] should be reached on the basis of that issue." [35]

On the two specially designated issues, the main studio move and the mail fraud inquiry, by the ALJ's reasoning Cowles escaped unscathed.

2. *Standard Comparative Issues.*

a. Diversification of Media Ownership

The ALJ concluded that "the advantage lies with Central" under the diversification factor because it had "no connection of any sort with any other mass media out-

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[33] *Id.* ¶ 185, J.A. at 132.

[34] *Id.* ¶ 184, J.A. at 131-32.

[35] *Id.* ¶ 186, J.A. at 132.

let." [36] Cowles' parent, CCI, owned an AM-FM-TV combination in Des Moines, Iowa, and another CCI subsidiary owned AM and FM radio stations in Memphis, Tennessee. While these interests were "remote" from Daytona Beach, the ALJ held that they remained a "significant factor in the ultimate choice." [37] The ALJ further noted that CCI owned a substantial stock interest in the New York Times Company, which publishes the *New York Times* and has extensive publishing and broadcast holdings. Gardner Cowles, Chairman of CCI, was then a director of the New York Times Company. In addition, certain CCI stockholders had substantial mass media interests. The Des Moines Register and Tribune Company owned 9% of CCI's stock and had an 11% stock interest in the Minneapolis Star and Tribune Company. But the ALJ concluded these related mass media interests were of "little decisional significance" because CCI did not control the New York Times Company, nor did the Des Moines Register and Tribune Company control CCI. Thus, no potential existed for compelling the media involved to "speak with a common voice," and the basic policy underlying the diversification standard was "not disserved." [38]

The ALJ then concluded that although Central's advantage was "clear," it would not be "compelling" unless Central were shown likely to render public service "at least as good" as that of Cowles.[39] This was especially true in the present context where renewal "would not increase the existing concentration of control." The ALJ found that Cowles' incumbency evinced a prior Commission determination that its media connections were not contrary to the public interest. Moreover, the ALJ noted

[36] *Id.* ¶ 193, J.A. at 133-34.

[37] *Id.*

[38] *Id.* ¶ 194, J.A. at 134.

[39] *Id.* ¶ 195, J.A. at 134.

the Commission's reluctance to employ comparative renewal proceedings to restructure the broadcast industry. In his view, the benefits from increased diversification had to be balanced against the public necessity of a stable broadcast industry. Accordingly, the ALJ concluded that a comparative renewal hearing should occasion an increase in diversification only if the competing applicant appeared likely to render service at least as good as that which the public had been receiving.

b. Best Practicable Service

Under the criterion of "best practicable service" the ALJ made findings with respect to two matters: (1) Central's proposals regarding the participation of owners in the station management; and (2) the quality of Cowles' past service.

(1) Integration of Ownership and Management

The ALJ found Central's integration proposals to be "very weak," and concluded that Central's owners would probably not play more than a nominal role in station affairs.[40] He noted full time participation by station owners is of substantial importance under the 1965 criteria. But here, full time participation was proposed by only three of Central's shareholders, collectively owning 10.5% of Central's stock. While "not inconsequential," this ownership interest was not sufficient to control corporate policy. Further, the proposed integration was largely temporary. The important positions of General Manager and Program Director would be held by Mr. Stead and Mrs. Goddard, respectively, but Stead would serve only in Central's "formative stages," and Mrs. Goddard only until the station were "thoroughly organized and stabilized." The ALJ consequently found it unlikely that the benefits

[40] *Id.* ¶ 201, J.A. at 136.

of integration would continue throughout the license period. Moreover, the shareholders' lack of broadcast experience, ordinarily unimportant because remediable, became significant in light of the limited tenure contemplated. In sum, the ALJ found that full time integration of management and ownership would be limited to Mr. Chambers, a 3.5% stockholder who would be supervisor of Administration. His duties were undefined and nothing indicated that he would be involved in determining the nature or content of program service.

The ALJ conceded several of Central stockholders would participate in management on a part-time basis, primarily as consultants, but noted that little weight attached to such participation under the *Policy Statement*. In his view, part-time contributions by those who are "essentially dilletantes" rarely has a material effect on overall station operations.

(2) Cowles Past Service

The ALJ found that Cowles' past performance had been "thoroughly acceptable." [41] He observed that Cowles had developed and presented "a substantial number of programs . . . designed to serve the needs and interests of its community." A number of local residents and community leaders had expressed satisfaction with the station's performance, and there had been no complaints concerning the station's operation. Moreover, the ALJ found "no reason to believe that future performance would be less satisfactory." Although the unauthorized move of the main studio warranted a "comparative demerit," since it was not done in bad faith and had not lowered the quality of service to Daytona Beach, it would not support a conclusion that Cowles was unlikely to continue to provide "proper service." [42]

[41] *Id.* ¶ 202, J.A. at 136.

[42] *Id.* ¶ 203, J.A. at 136.

c. The Public Interest Finding on the Two Standard Comparative Issues

In the end, the ALJ concluded that Cowles merited a "distinct preference" under the best practicable service criterion and that that preference outweighed Central's preference under the diversification criterion. The ALJ reasoned that absent a showing that the degree of industry concentration which had existed when Cowles was originally licensed had "actually disserved the public interest," the more compelling objective was obtaining the best practicable service.[43]

B. *The Commission Decision.*

The Commission affirmed the decision of the ALJ with certain modifications. It concluded that the ALJ had correctly disposed of the main studio issue.[44] Thus, the Commission rejected both Cowles contention that there had been no *de facto* move of the main studio and Central's argument that the finding without more should have disqualified Cowles. Further, the Commission generally approved the ALJ's treatment of the factors mitigating the effect of the studio move.

The Commission sustained the ALJ again with respect to the mail fraud issue, finding he had properly refused "to impart decisional significance" to the evidence of wrong-doing. Inasmuch as Cowles was not shown to be implicated in the PDS practices and there appeared to be no criminal case against CCI or its personnel, the Com-

[43] *Id.* ¶ 205, J.A. at 137. The ALJ gave Cowles a "definite plus" for the superiority of its facilities at Orlando. *Id.* ¶ 204, J.A. at 137. This was overturned by the Commission, 60 F.C.C.2d at 416, in light of the impropriety of the *de facto* move which had enhanced those facilities.

[44] 60 F.C.C.2d at 398-400.

mission declined "to attribute the sins of the PDS's to CCI and then visit them on Cowles' head." [45]

Again, by the Commission's reasoning on the two specially designated issues, Cowles lost no ground. The Commission then turned to the two standard issues, diversification and service.

Reviewing the ALJ's treatment of the diversification issue, the Commission affirmed the award of a preference, finding Central's advantage "clear." [46] The Commission agreed that the significance of the preference was reduced by the fact that CCI's other broadcast and newspaper interests were remote from Daytona Beach and were not shown to dominate their markets. Moreover, the Commission reiterated its reluctance to use the diversification criterion to restructure the broadcast industry, observing that "the need for industry stability had its own decisional bearing here." In a subsequent order, the Commission expanded its discussion, finding that the autonomy which CCI accorded to the local station management further reduced the significance of Central's preference.[47] Inasmuch as the Commission could find no

[45] *Id.* at 405.

[46] *Id.* at 409.

[47] 62 F.C.C.2d at 956. Central argues that the Commission was without jurisdiction to reconsider *sua sponte* its earlier disposition of the comparative issues. Brief of Appellant at 6. We disagree. Commission rules permit it to set aside on its own motion any action within 30 days after release of the order. 47 C.F.R. 1.108 (1977). It is Commission practice that the filing of a petition for reconsideration tolls the running of the thirty day period. *See Radio Americana, Inc.*, 44 F.C.C. 2506, 2510-2511 (1961). *See also Old Belt Broadcasting Corp. (WSWS)*, 44 F.C.C. 1826, 1830 n.3 (1959). We believe it is not unreasonable that where, as here, several petitions are consolidated for hearing and decision, a petition for reconsideration of any of the ensuing orders tolls the thirty day period as to all orders in the case. To find otherwise would often result in anomaly and unfairness. Thus the *sua sponte* reconsiderations were timely in this case. The fact that appeal from the original order had already been brought in this court does not independently preclude reconsideration. *See Wrather-Alvarez Broadcasting, Inc.* v. *FCC*, 248 F.2d 646, 648-49 (D.C. Cir. 1957).

evidence in the record "that the dangers of concentration . . . exist in this case," the preference was found to be "of little decisional significance." [48]

The ALJ's conclusions with respect to the best practicable service issue were modified in light of this court's *TV-9* decision [49] and the Commission's finding that insufficient weight had attached to Cowles broadcast record. The Commission held that the minority group participation proposed by Central entitled it to a merit under our *TV-9* decision. Nonetheless, even when considered in conjunction with the merit to which Central was admittedly entitled for integration of ownership and manage-

[48] 62 F.C.C.2d at 957.

[49] *TV-9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1974). In *TV-9* we held it was erroneous for the Commission to refuse to accord merit to an applicant for the "ownership and participation" of "its two Black stockholders." *Id.* at 941 (supplemental opinion). *See also Garret* v. *FCC*, 513 F.2d 1056, 1062-63 (D.C. Cir. 1975).

In our supplemental opinion in *TV-9*, 495 F.2d at 941, we distinguished our use of "merit" from "preference." We explained that the latter term was used "to mean a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns." *Id.* n.2. " 'Merit' or 'favorable consideration,' " we said, "is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference." " 'Merit,' therefore, is not a 'preference' but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded the preference." *Id.*

ment, the additional merit was not sufficient to outweigh the facts in Cowles' favor under the best practicable service criterion.

Finally, the Commission revised the ALJ's characterization of Cowles' record as "thoroughly acceptable." Finding this phrase "too vague to be meaningful," and not adequately expressing "the outstanding quality of Cowles' past performance," the Commission found that performance to have been "superior" in the sense in which we used the word in our *Citizens* opinion—"justifying a plus of major significance," and inferentially, supporting an expectation of renewal.[50] In a subsequent order, the Commission clarified its use of the word "superior." It had meant that the level of service provided by Cowles was "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." [51] It had not intended to suggest that the performance was exceptional when compared to other stations.

The Commission thus articulated the final and decisive tally:

> The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i.e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely

[50] 60 F.C.C.2d at 421-22.

[51] 62 F.C.C.2d at 955.

> do not outweigh the substantial service Cowles rendered to the public during the last license period.[52]

II. Analysis

The function of this court in reviewing a Commission decision is, as we have often recounted, a fairly limited one. This is particularly the case when the Commission acts under its broad mandate to license in the public interest. However, within the constraints upon our review, we must insist on adherence to those principles which assure the rule of law. Thus we must be satisfied that the agency has given reasoned consideration to all the material facts and issues;[53] that its findings of fact are supported by substantial evidence;[54] and that if its notion of the public interest changes, that at least it has not deviated from prior policy without sufficient explanation.[55] In general, the agency must engage in reasoned decision-making, articulating with some clarity the reasons for its decisions and the significance of facts particularly relied on. Admittedly, this is not an easy matter in comparative renewal proceedings, "but at least so long as the government uses the forms of adjudication, and does not turn, e.g., to bidding, or even chance . . . , reasoned decision-making remains a requirement of our law." [56]

[52] *Id.* at 958.

[53] *See, e.g., Greater Boston Television Corp.* v. *FCC*, 444 F.2d at 851.

[54] *See, e.g., Fidelity Television, Inc.* v. *FCC*, 515 F.2d at 699.

[55] *See, e.g., Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

[56] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d at 852 (footnote omitted).

With this preface, we hold that the Commission acted unreasonably and without substantial record support in this matter and we remand for further proceedings.

The Commission's rationale in this case is thoroughly unsatisfying. The Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration, and minority participation, and adversely to Cowles on the studio move question. Then simply on the basis of wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy." Even were we to agree (and we do not agree) with the Commission's trivialization of each of Central's advantages, we still would be unable to sustain its action here. The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on "administrative 'feel.' " [57] Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.

The Commission's treatment of the standard comparative issues—diversification of media ownership and best practicable service—is the most worrisome aspect of this case. The Commission plainly disfavors use of the 1965 criteria in comparative renewal proceedings. This in turn is largely because the Commission dislikes the idea of comparative renewal proceedings altogether [58]—or at least

[57] 60 F.C.C.2d at 422.

[58] Although we would ordinarily be reluctant to reach such conclusions concerning the Commission's state of mind, it has been extraordinarily candid in this matter. *See Report, supra* note 4, ¶¶ 60-81, J.A. at 213-24, concluding, *inter alia*, "that the comparative renewal process should be abolished." *Id.* ¶ 61, J.A. at 213. *See also Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d at 430, 433 (Chairman Wiley dissenting) ("[T]he

those that accord no presumptive weight to incumbency *per se*.[59] As long as the renewal hearings were carried on in a completely *ad hoc* manner, it was little noticed that they were not really comparative. But the restatement of the comparative criteria in 1965 imposed an orderliness on the inquiry which made it obvious when applicants were not in fact on an equal footing. This would never have been a problem if the Commission had been able to distinguish in its rules between hearings comparing only new applicants and comparative renewal hearings. This it was unable to do and the *1965 Policy Statement* has since governed comparative renewal proceedings more or less by default.[60]

1965 standards concerning diversification and integration advance no public purpose to which agency is truly committed and, if implemented in a rigorous fashion, could well have a serious destabilizing effect on the broadcast industry to the detriment of the . . . public.")

[59] Some sort of presumption of renewal was implicit in Commission practice at least until the 1965 *Policy Statement*. *See* notes 2 and 17 *supra*. The *1970 Commission Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, supra* note 21, which we struck down in *Citizens Communication Center* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971), expressly adopted a presumption of renewal if "substantial" past service could be shown. Most proposed legislative reforms would enact some such presumption. *See* S. 2004, 91st Cong., 1st Sess. (1969) (bill introduced by Senator Pastore and withdrawn when Commission issued its *1970 Policy Statement, supra*); H.R. 13015, § 437(a), 95th Cong., 2d Sess. (1978) ("In any case in which a television broadcasting station submits an application to the Commission for the renewal of a license, the Commission may not consider any competing application for such license in determining whether to renew such license.")

[60] In light of *Citizens*, it is doubtful whether any such distinction would be lawful without an amendment to the hearing provisions of the Communications Act, 47 U.S.C. § 309(e) (1970). The Commission abandoned its effort to substitute

Since the 1965 *Statement* admits little room for a presumption of renewal, the Commission has reconstructed the criteria in a manner creating a *de facto* presumption.[61] Whether justified in precedent or logic, the process

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simple quantitative standards for its ad hoc inquiry under the 1965 criteria in comparative renewal hearings. *See Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 F.C.C.2d 419 (1977), *review pending sub nom. National Black Media Coalition* v. *FCC*, No. 77-1500 (D.C. Cir.) [hereinafter cited as *Formulation of Policies*].

[61] *See, e.g., id.* at 430:

> As illustrated most recently in the Daytona Beach, Florida case [this case], the renewal applicant must, therefore, continue to run on its record, and we believe that that record should be measured by the degree to which the licensee's program performance was sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal. Where the renewal applicant has served the public interest in such a substantial fashion, it will be entitled to the "legitimate renewal expectancy" clearly "implicit in the structure of the [Communications] Act." *Greater Boston Television Corporation* v. *F.C.C., supra*, 143 U.S.App.D.C. at 396, 444 F.2d at 854. Thereafter, we will direct our attention to the comparative factors set forth in the *1965 Policy Statement, supra*. While that policy statement will otherwise govern the introduction of evidence in the comparative renewal proceeding, the weight to be accorded the legitimate renewal expectancy of the incumbent licensee and the significance of other comparative considerations will depend on the facts of the particular case.

If the reader is unable to distinguish this *modus operandi* from prior instances of a renewal presumption attaching to some measure of substantial service, note 59 *supra*, neither are we.

The Commission elsewhere makes equally erroneous statements of the law, using the language of burden of proof. *See* 60 F.C.C.2d at 421 ("Central has long known that if it wished to displace Cowles it would have to prove, *inter alia*, that Cowles' past performance was below average.")

has been straightforward and comports at least formally with the requirement of a "full hearing": (1) the criteria of diversification and integration were converted from structural questions (challengers usually prevailed on the simple numbers) to functional questions regarding the consequences of other media ownership and autonomous management (but challengers could rarely show injury to the public service);[62] (2) a finding of "substantial," if not above average, past performance by the incumbent would be given decisive weight;[63] and (3) other comparative or designated issues favoring the challenger would be noted, but would not be dispositive "even in conjunction with other factors," [64] unless pertaining to grievous misconduct by the incumbent.

This usual procedure, we believe, although the Commission nowhere tells us, is essentially what occurred here. The development of Commission policy on comparative renewal hearings has now departed sufficiently from the established law, statutory and judicial precedent, that the Commission's handling of the facts of this case make embarrassingly clear that the FCC has practically erected a presumption of renewal that is inconsistent with the full hearing requirement of § 309(e).

A. *The Designated Issues.*

1. *The Main Studio Move.*

The Commission was amply supported in its finding that Cowles moved its main studio from Daytona Beach to Orlando, in violation of FCC regulations. The Commission concluded, however, that this violation was miti-

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[62] *See* pp. 26-30, 33-35 *infra*.

[63] *See* pp. 35-38 *infra*.

[64] *See* pp. 17-18 *supra*.

gated by two factors: (1) the move was not effected in "deliberate definance" of FCC rules; and (2) Central made no showing that service to Daytona had suffered as a result of the *de facto* move. Consequently, Cowles was given a "slight demerit" for its violation. Apparently even this would overstate the Commission's reaction, for in its original order it appeared to give the violation no weight at all.[65]

Admittedly, the choice of remedies and sanctions for violations of Commission rules "is a matter wherein the Commission has broad discretion." [66] Moreover, in exercising that discretion the Commission is free to consider mitigating factors. But the Commission is not free wholly to disregard violations of its rules. Moreover, we find neither of the "mitigating" factors relied on by the Commission in this case to be persuasive.

First, while a showing of harm occasioned by the violation would be relevant to the *severity* of the sanction imposed, the failure to show injury hardly excuses a plain violation. The regulation here involves a presumption that it is bad to have the main studio located—or slyly relocated—other than in the principal community. The

[65] The Commission apparently thought the unlawful studio move relevant only to the issue of best practicable service, and having found that the move had not been shown to injure service, concluded that Cowles' distinct preference on the service issue was unimpaired, 60 F.C.C.2d at 422. It is somewhat unclear from the Commission's restatement of the overall balance in its subsequent order whether or not the violation was a demerit *per se*, 62 F.C.C.2d at 958, but it is in any case plain from its earlier discussion of the mitigating factors, *see* p. 15 and note 44 *supra*, that the violation was given very little weight.

[66] *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also Greater Boston Television Corp.* v. *FCC*, 444 F.2d at 861.

rule would be substantially undercut if a party relying on it were forced in each case to show that the move did in fact injure the quality of service.

Second, we fail to see how Cowles' violation is "mitigated" by the fact that its conduct may not have been nefarious. Obviously Cowles moved its principal operations little by little; and it is well-settled that people are held to intend the obvious consequences of their acts. Further, Cowles is chargeable with knowledge of the main studio regulation. Thus, we are left with an intentional violation of a Commission rule. Of course, if Cowles had acted in bad faith, that might aggravate its violation; but the mere absence of bad faith cannot mitigate it.

On remand, the Commission should reconsider what weight to accord Cowles' plain violation of an FCC rule.

2. *The Mail Fraud Issue.*

We have two difficulties with the Commission's treatment of the PDS matter. First, it appears from the record that there were at least two persons who were principal officers both of Cowles and of each of the five PDS subsidiaries.[67] *Neither the ALJ nor the Commission*

[67] Marvin C. Whatmore is the Treasurer of Cowles and the President of CCI. *See Initial Decision* ¶ 116, J.A. at 116. The record shows that he is also the Senior Vice President and a Director of Home Reader Service, Inc., J.A. at 708; a Vice President and Treasurer of Mutual Readers League, Inc., J.A. at 744; a Vice President of Home Reference Library, Inc., J.A. at 784; a Vice President, Treasurer, and a Director of Civic Reading Club, Inc., J.A. at 820; and a Vice President and a Director of Educational Book Club, Inc., J.A. at 873.

The record shows that John F. Harding was Secretary of Cowles, and the Executive Vice President and General Counsel of CCI. *See Initial Decision* ¶ 116, J.A. at 116. Additionally, he was a Vice President and the Secretary of Home Reader

made findings concerning these common officers. In light of this uncontradicted evidence it is plain that the Commission's finding that there was no connection between Cowles and the PDS companies apart from common ownership by CCI is unsupportable. On remand the Commission will have to reconsider its findings and, if appropriate, consider the relevance of wrong-doing by a related corporation sharing principal officers with the licensee.

Second, while not unmindful of the time already occupied exploring this matter, we are troubled by appellant's contentions that the inquiry was curtailed in certain material respects. Specifically, Central argues (1) that the ALJ erroneously quashed subpoenas requiring the testimony of the postal inspectors conducting the mail fraud inquiry;[68] and (2) that it was error not to inquire into proceedings involving similar allegations being conducted by the Federal Trade Commission and various states.[69] As we are unable to decide these claims on the record before us, it will be appropriate on remand for the Commission to review the pertinent rulings by the ALJ to determine if any were prejudicial to a full and fair inquiry.

B. *Standard Comparative Issues.*

1. *Diversification.*

The effect of the Commission's reconstruction of the diversification criteria is obvious in its belittling of Cen-

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Service, Inc., J.A. at 716; a Vice President and Secretary of Mutual Readers League, Inc., J.A. at 744; a Vice President and Secretary of Home Reference Library, Inc., J.A. at 784; a Vice President, Secretary and a Director of Civic Reading Club, Inc., J.A. at 820, 823; and a Vice President, Secretary and a Director of Educational Books Club, Inc., J.A. at 873, 876.

[68] Brief of Appellant at 22-23.

[69] *Id.* at 20-21.

tral's advantage there. Because of its lack of other media interests, as contrasted with those of Cowles, Central was found by the ALJ and the Commission to have a "clear advantage" and was consequently accorded a "clear preference." However, the Commission found that the significance of the "clear preference" was reduced by several factors and that, in the end, the preference was "of little decisional significance." [70]

We fail to see how a "clear preference" on a matter which the Commission itself has called a "factor of primary significance" can fairly be of "little decisional significance." We should have thought the relevance of unconcentrated media *ownership* to the public interest inquiry was well-settled. We said—and rather plainly said—in *Citizens* that:

> the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.[71]

In light of this the Commission itself has stated "whatever policy is developed [in the future] will take into account diversification as a factor that must be considered in a comparative renewal hearing." [72] Nor, as we have noted, does the Commission in this case purport to disregard the diversification factor. It merely found the

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[70] 62 F.C.C.2d at 957.

[71] *Citizens Communication Center* v. *FCC*, 447 F.2d at 1213 n.36.

[72] *Second Report and Order on Multiple Ownership*, 50 F.C.C.2d 1046, 1088, *amended upon reconsideration*, 53 F.C.C. 2d 589 (1975), *aff'd sub nom. FCC* v. *National Citizens Committee for Broadcasting*, 46 U.S.L.W. 4609 (U.S. 12 June 1978).

applicants' clear difference uninteresting as there was no showing "that the dangers of concentration . . . exist in this case." [73]

Apart from the obvious unfairness of placing this novel burden on Central without fair notice, the question arises whether this has not seriously undercut the utility of the diversification criterion. The brief answer must be that it has.

There is *some* support for the relevance of the factors on which the Commission relied. The *1965 Policy Statement* did say that related media interests within the service area were usually *more* important than more distant interests.[74] It did not nearly say that interests outside the service area were unimportant. In fact, the fairer inference, and the one more consistent with other Commission policy,[75] is that related media interests anywhere in the nation are quite material.

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[73] 62 F.C.C.2d at 957.

[74] There the Commission said that the media interests were to be considered in light of the following schedule:

> Other interests in the principal community proposed to be served will normally be of most significance, followed by other media interests in the remainder of the proposed service area and, finally, generally in the United States.

1 F.C.C.2d at 394-95 (1965).

[75] *See Multiple Ownership of AM, FM, and Television Broadcast Stations*, 18 F.C.C. 288 (1953). These regulations limited each person to a total of seven AM radio stations, seven FM radio stations, and five VHF television stations *anywhere in the United States*. They were upheld in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). Of course, it is strongly arguable that rule-making is preferable to *ad hoc* license renewal proceedings as an occasion for restructuring the broadcast industry, *see Report*, supra note 4, ¶ 65, J.App. at 214-15, but so long as the Commission purports to be relying on diversification as a material factor in renewal hearings, it must do so in a reasonable manner. *See* p. 30 *infra*.

More troubling still is the Commission's reliance on the autonomy which CCI accorded the local management of Cowles. This, in conjunction with the "remoteness" of CCI's other media interests, led the Commission to conclude that there had been "no adverse effect upon the flow of information to those persons in WESH-TV's service area." Further:

> We can find no evidence in the record that the dangers of concentration, which we have characterized as any national or other uniform expression of political, economic, or social opinion, exist in this case.[76]

The theory that management autonomy may satisfy the function of diversification was wholly novel when presented to this court in *Fidelity Television, Inc.*, v. *FCC*. There we were faced with a "nothing" applicant "who offers little more and is likely in fact to provide somewhat less than the incumbent." [77] We held that the FCC had not acted unlawfully in finding that local autonomy met the objectives of diversification "sufficiently to withstand the competition of a 'nothing' competitor.[78] Whether it would have been more appropriate in *Fidelity* to concede the challenger's advantage under diversification but to conclude that that need not carry the day, is not now before us.

In any case we are reluctant to expand the relevance of local autonomy much beyond the facts of *Fidelity* for two reasons. First, the prospect of inquiry into the content of programming as would be entailed in defining "uniform expression" raises serious First Amendment

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[76] 62 F.C.C.2d at 957.

[77] *Fidelity Television, Inc.* v. *FCC*, 515 F.2d at 704.

[78] *Id.* at 705.

questions.[79] Indeed, the Commission was sensitive to the threat of just such intrusions when it declined to employ quantitative program standards in comparative renewal hearings.[80] Second, to require a showing of the "dangers of concentration" in each case would remove the customary presumption on which the structural approach to increasing ownership diversification has rested. Given the likely difficulties of proof in such matters, widespread reliance on the autonomy excuse would effectively repeal the diversification criterion.

Summarizing, we conclude that inasmuch as the Commission correctly found that Central's advantage was "clear," it was unreasonable then to accord the diversification finding "little decisional significance." On remand, it will be appropriate for the Commission to reconsider its conclusions in light of the following: (1) the conceded relevance of diversification of media ownership in the comparative renewal context; (2) the materiality of related media interests *anywhere in the nation*; and (3) the evident hazards of relying on local management autonomy as a surrogate for diversification of media ownership.

2. *Best Practicable Service.*

Whatever weight the Commission may have given to Central's advantages under the integration and minority participation criteria, it was not enough to "outweigh" Cowles' unexceptional record. This puzzling result appears more bizarre as it is thought about. First we note there was no direct inquiry into whether Central's proposed service would be "superior" or even just "sub-

[79] *See id.* at 705, 716 (Bazelon, C.J.) (voting to grant rehearing en banc). *See also Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976).

[80] *Formulation of Policies*, 66 F.C.C.2d at 426, 430.

stantial." The Commission rejected that question as too speculative, preferring to rely on those structural characteristics identified in the 1965 statement.[81] These it supposed were less susceptible of puffery than representations concerning future programming. That is probably correct. The fly in the analysis is that the Commission judges incumbents largely on the basis of their broadcast record,[82] to which there will be nothing comparable on the side of a challenger in any case. The "comparison" thus necessarily ends up rather confused. For at the end of a hearing the Commission is left on the one hand with a series of comparative findings pertaining to integration, etc., and on the other hand with a wholly incommensurable and noncomparative finding about the incumbent's past performance. Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be. But findings on integration and minority participation are

[81] *See Initial Decision* ¶¶ 191-92, J.A. at 133. Thus it is Commission practice not to designate an issue pertaining to the challenging applicant's proposed programming unless the challenger makes "a prima facie showing that there are significant differences" related to its "ascertainment of community needs." *Chapman Radio and Television Co.*, 7 F.C.C.2d 213, 215 (1967). As was pointed out to us in oral argument, in this case, Central did not request that its programming proposals be designated for hearing.

[82] At the time of the Initial Decision, the renewal applicants' past broadcast record was the exclusive basis for predicting its future performance. *See Initial Decision* ¶ 191, J.A. at 133; *Wadeco, Inc.*, 41 F.C.C.2d 251 (1973). The Commission changed its position prior to its decision in this case; although still according primary weight to the renewal applicant's past record, it will also consider other comparative criteria under the 1965 statement in comparing a renewal applicant and a new applicant. *See Belo Broadcasting Corp.*, 47 F.C.C.2d 540 (1974). In light of the altered practice, the Commission made its own findings regarding Cowles' "integration proposals," 60 F.C.C.2d at 416.

evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger.*

In a comparative inquiry evidence of past performance is ordinarily relevant only insofar as it predicts whether future performance will be better or worse than that of competing applicants.[83] The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's.[84] In fact, as we have noted, *Central prevailed on each of the questions supposedly predicting which applicant would better perform*—the same criteria the Commission uses for this purpose in nonrenewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practicable service.

In light of this we leave to conjecture what leap of faith would be required to find that Cowles prevailed in the overall inquiry. On remand, the Commission will have to reconsider its manner of deriving a preference under the best practicable service criterion, and if appropriate, how such a preference should be balanced against other factors in the more general public interest inquiry. To

[83] Although this proposition is hardly apparent from Commission renewal practice, *see, e.g.*, 62 F.C.C.2d at 958 ("[W]e make clear that a substantial performance—i.e. sound, favorable—is entitled to legitimate renewal expectancies."), we believe that it fairly states the relevance of past performance. Admittedly this more limited relevance will remit the Commission to those 1965 comparative criteria which it finds distasteful in the renewal context. *See* note 58 *supra*. Absent statutory amendment, *see* note 59 *supra*, or promulgation of other comparative criteria, *e.g.*, *Formulation of Policies*, 66 F.C.C.2d at 433, 438 (separate statement of Commissioners Hooks and Fogarty), we see no lawful alternative.

[84] *Fidelity Television*, 515 F.2d at 689 n.3. *See also* 47 C.F.R. §§ 0.281(a), 1.561, 1.562, and 1.591 (1977).

avoid, if possible, further appeal in this case, we address ourselves to more specific objections to the disposition of the best practicable service question.

a. *Integration*

We confess we were unable to make sense of the Commission's treatment of the integration issue, though we will reconstruct its language. The ALJ found that Central's integration proposals were "very weak." The Commission agreed, although it found Central's showing "somewhat stronger than that of Cowles." The Commission then noted that the ALJ's findings should be amended in light of this court's intervening *TV-9* decision; it thus gave Central a "merit" for its proposed black participation. Pre-figuring the outcome, the Commission said that the "merit" and the "slight preference" (for integration) were insufficient to outweigh the factors in Cowles' favor under the best practicable service criterion. Oddly, four paragraphs later the Commission rethought the integration matter and decided that "neither is entitled to a preference"—not even a slight one—though Central was entitled to a "merit."[85] Odder still, this "merit" (distinct from the *TV-9* merit) is never heard of again.[86]

More troubling is the manner by which Central's integration "preference" became a "merit." In a way wholly analogous to the diversification question, the Commission replaced the customary integration criterion (under which Cowles faired miserably, being absentee-owned by CCI) with a functional inquiry into whether management autonomy had been an adequate surrogate for

[85] 60 F.C.C.2d at 416.

[86] Leading the cynical to suggest that the only difference between a "preference" and a "merit" is that the latter may be misplaced without embarrassment.

owner-management.[87] Unsurprisingly, the Commission concluded that on this record it had. This permitted it to conclude "that the integration proposals of both applicants are substantially similar." [88] Mildly put, this finding is incredible if anything remains of the customary integration criterion.

This further repeal of the 1965 standards again derives some support from our opinion in *Fidelity*.[89] Like the reconstructed diversification analysis, the notion of functional integration was novel when presented in that case, and we have already recounted the special circumstances presented there. It may well have seemed, recalling the court's characterization of Fidelity as a "nothing" applicant, that the modifications of the 1965 criteria left the substance of the comparative hearing unimpaired. On the facts of this case, the same cannot be said. The Commission's treatment of the integration criterion, in light of its treatment of diversification and Cowles' past performance, has denied Central the substance of its right to a full hearing, and is *ipso facto* unreasonable. The Commission may not, comfortably with the hearing mandate of § 309(e), practically abandon the 1965 criteria without providing an alternate scheme affording a thorough and intelligible comparison. On remand, the Commission will have occasion to reconsider its findings on the integration issue.

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[87] 60 F.C.C.2d at 415, 416. In finding this ersatz integration enhanced by local management's civic interests, the Commission seems to be running headlong into itself, *see Lorain Community Broadcasting Co.*, 13 F.C.C.2d 106, 109-10 (Rev. Bd. 1968); *Report, supra* note 4, ¶ 25, J.A. at 189, although to be sure it has done so before with this court's pardon. *See Fidelity Television, Inc.* v. *FCC*, 515 F.2d at 701.

[88] 60 F.C.C.2d at 416.

[89] *Fidelity Television, Inc.* v. *FCC*, 515 F.2d at 700-01.

b. *Cowles' Past Performance*

For anyone who remained hopeful that Central's now-shrunken advantages would carry the day, the treatment of Cowles' past performance was plainly the *coup de grace*. The Commission recharacterized as "superior" the record which the ALJ had found "thoroughly acceptable." Evidently, the Commission felt that a recitation of the idiom in *Citizens* would permit it to recognize Cowles' "renewal expectancy." If that were correct, we might be more inclined to resist the Commission's characterization.[90] However, a finding of "superior" service is not

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[90] Chairman Wiley was similarly skeptical about the "superiority" of Cowles' performance. Dissenting from the Commission's first order, 60 F.C.C.2d at 430, the Chairman concluded that Cowles' "thoroughly acceptable" performance was "insufficient to offset [its] disadvantage under the other comparative criteria." *Id.* at 431. Then in light of the Commission's subsequent opinion, Chairman Wiley concurred in the renewal, predicated now on a more modest characterization of Cowles' performance:

> In its original opinion, the majority adopted the requirement of "superior service" as set forth in dictum in *Citizens Communication Center* v. *FCC*. I dissented to this determination on the grounds that WESH-TV's service, while "thoroughly adequate" so as to justify renewal under any rational renewal system, was simply not "superior." On reconsideration, the majority now articulates the required standard of service as "solid and favorable" (as opposed to superior in terms of exceptional or of the highest possible level).
>
> As indicated, *I did not—and do not now—find Cowles' service to be superior (in the sense of exceptional)*. However, I did—and do now—find that service to be sufficiently substantial (in the sense of solid and favorable) to warrant renewal. Accordingly, given the majority's clarification of intent, I find myself able to concur in this matter.

62 F.C.C.2d at 958-59 (emphasis added). Although the Commission majority in its clarification, did not expressly find that

an end to the inquiry; it is rather, as we stated in *Citizens*, a "plus of major significance" to be factored into the comparative analysis. In its reconsideration, the Commission resisted general use of the word "superior" preferring the word "substantial" to describe records such as Cowles'. This the Commission felt would not "convey the impression that . . . past programming was exceptional when compared to other broadcast stations in service area or elsewhere."[91] If by this the Commission means either (1) that "substantial" service will justify renewal *more or less* without regard to comparative issues;[92] or (2) that "substantial" performance which is not above the average is entitled to "a plus of major significance,"[93] it is plainly mistaken. We emphasize that

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Cowles' performance was *not* superior, it did decline to find that it *was superior in the sense of being exceptional.* 62 F.C.C.2d at 956. It being conceded that Cowles' record was not exceptional, we have no quarrel with the Commission's assessment, which is amply supported. *See* 60 F.C.C.2d at 421.

[91] 62 F.C.C.2d at 956.

[92] This inference is inescapable in light of the Commission's numerous statements in this case, *e.g.*, 60 F.C.C.2d at 421-22; 62 F.C.C.2d at 956, 958; and elsewhere. *E.g., Formulation of Policies*, 66 F.C.C.2d at 430.

The Commission is not unwitting of its error. It has recently recalled (not in a renewal proceeding to be sure) that this court has proscribed just such noncomparative renewal decisions. *See Report, supra* note 4, ¶ 79, J.A. at 222.

[93] As the Commission finds substantial service, without more, to be dispositive, it has no occasion to make the somewhat less erroneous determination merely to accord its finding excessive weight. We have previously described the quality of performance entitled to "a plus of major significance:"

> We used the word "superior" in its ordinary dictionary meaning: "far above the average." Webster's New World Dictionary 1463 (college ed. 1968). And we suggested specific criteria for use in determining whether an incumbent had performed in a "superior" manner, including (1) elimination of excessive and loud advertising; (2) delivery of quality programs; (3) the extent to which the incumbent has reinvested the profit from his license to the service of the viewing and listening public; (4) diversification of ownership of mass media; and (5) independence from government influence in promoting First Amendment objectives.

Citizens Communication Center v. *FCC*, 463 F.2d 822, 823 (D.C. Cir. 1972), *clarifying Citizens Communication Center*, 447 F.2d 1201 (D.C. Cir. 1971). Because the Commission did not purport to find Cowles' performance superior, *see* note 90 *supra*, we have no occasion to review its conformance with our second *Citizens* opinion.

lawful renewal expectancies are confined to the likelihood that an incumbent will prevail in a fully comparative inquiry. "Superior" or above average past performance is, of course, highly relevant to the comparison, and might be expected to prevail absent some clear and strong showing by the challenger under the comparative factor (either affirmative bearing on the challenger's projected program performance, or negative regarding the incumbent's media ties or perhaps discovered character deficiencies) or other designated issues.[94] But we do not see how performance that is merely average, whether "solid" or not, can warrant renewal or, in fact, be of especial relevance without some finding that the challenger's performance would likely be no more satisfactory.[95]

On remand, the Commission will have occasion to reconsider its characterization of Cowles' past performance

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[94] *See Citizens Communication Center* v. *FCC*, 447 F.2d at 1213.

[95] This case does not raise the question whether, between equally qualified applicants, the renewal applicant lawfully may be preferred on the basis of a renewal expectancy. *E.g., Fidelity Television, Inc.* v. *FCC*, 515 F.2d at 702. We contemplate that such instances of equipoise will be exceedingly rare if the Commission seriously undertakes a full comparison.

and to articulate clearly the manner in which its findings are integrated into the comparative analysis.

III. Conclusion

We remand this case in light of our abiding conviction that the Commission's order is unsupported by the record and the prior law on which it purported to rely. We are especially troubled by the possibility that settled principles of administrative practice may be ignored because of the Commission's insecurity or unhappiness with the substance of the regulatory regime it is charged to enforce. Nothing would be more demoralizing or unsettling of expectations than for drifting administrative adjudications quietly to erode the statutory mandate of the Commission and judicial precedent.

Orders vacated and case remanded for proceedings consistent with this opinion.

APPENDIX B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 76-1742

Central Florida Enterprises, Inc., appellant

v.

Federal Communications Commission, appellee

Cowles Broadcasting, Inc., intervenor

Before: Robinson and Wilkey, *Circuit Judges*, and Flannery,* *Judge*, United States District Court for the District of Columbia.

Filed 12 January 1979

ORDER

Upon consideration of the petition for rehearing filed herein by appellee Federal Communications Commission, and of the further memorandum of said appellee filed herein on December 11, 1978, at the request of the Court, as supplemented by appellee on December 13, 1978, it is

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDERED, by the Court, *sua sponte*, that the Opinion for the Court, filed herein on 25 September 1978, be, and it hereby is, amended as follows:

(a) On page 7 of the slip opinion, strike the last four lines of text and substitute in lieu thereof the following:

Despite the language in *Citizens*, it is fair to say that the law governing comparative renewal proceedings remained unclear. Although *Ashbacker* had said a challenger could not be denied a hearing and *Citizens* apparently assured some kind of substantive comparison, the nature of the inquiry and the pertinence of "renewal expectancies" was left uncertain.

As an original matter, of course, a "renewal expectancy" could be shorthand for any of several plausible theories of the public interest standard contained in section 309. For example, expectations *could* be confined to the likelihood that an incumbent would prevail under the customary 1965 criteria without any special regard for the quality of its past performance one way or the other. It would hardly be sensible, however, to ignore the past, for it affords the "best evidence" of what the incumbent's future performance will be, and it has never been the Commission's practice to do so. Conceding therefore, that an incumbent's past performance is highly relevant, an incumbent with a meritorious record would possess a natural advantage insofar as its actual performance made its proposals more credible than the "paper promises" of a challenger. Some such comparative assessment of *likely* performances would, in fact, seem inescapable. It would then follow naturally from discounting the promises of challengers that incumbents would prevail more often, thereby assuring more "continuity" in the industry. The certainty thus afforded a meritorious incumbent through its natural comparative advantage may in turn induce it to commit enough resources to perpetuate its quality of service. An expectation raised by the probability of prevailing in the overall inquiry is, of course, fully compatible with the comparison assured by section 309.

We understand the Commission's present idea of renewal expectancies may be more expansive—that an "expectancy" may be generated by something less than or different from more meritorious service. An incumbent is said entitled to expect renewal if it has "served the public interest in . . . a substantial manner." Apparently, a "substantial" past record would be a factor weighed in the incumbent's favor *irrespective* of which applicant were predicted to perform better in the future. Such an entitlement would be provided to promote security directly and to induce investment which otherwise may not be made. Whether and in what manner placing such a thumb on the balance in an otherwise comparative inquiry may be reasonable are, we think, open and difficult questions.

In a number of cases before and after *Citizens* this court has had occasion to refer to renewal expectancies without much inquiry into the notion's content. Thus, in dictum in *Greater Boston Television Corp.* v. *FCC*, we observed there were "legitimate renewal expectancies implicit in the structure of the Act." We said that "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest.[24] In 1975, in our *Fidelity Television* opinion, confronted with a weak licensee and a weak contender, both only "minimally acceptable applicants," we said "when faced with a fairly and evenly balanced record, the Commission may on the basis of the renewal applicant's past performance, award him the license." [25]

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[24] 444 F.2d at 554.

[25] 515 F.2d at 702.

Finally, last term the Supreme Court observed, in the context of reviewing the FCC's regulations barring certain newspaper-broadcast combinations, that industry stability has consistently been a concern in comparative renewal procedings. It said:

> In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause. *Greater Boston Television Corp.* v. *FCC*, —— U.S.App.D.C. ——, 447 F.2d 841, 845 (1970), *cert. denied*, 403 U.S. 923 (1971); see *Citizens Communications Center* v. *FCC*, —— U.S. App. D.C. ——, 447 F.2d 1201, 1213 and n.35 (1971); Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, [66 F.C.C.2d at 420].[26]

Thus, although not a precise concept, renewal expectancies derived from "meritorious service" (to use the Supreme Court's terminology) are a natural aspect of the public interest inquiry carried on under section 309(e). Moreover, "the weighing of policies under the 'public

[26] *FCC* v. *National Citizens Committee for Broadcasting*, 46 U.S.L.W. 4609, 4617 (U.S. 12 June 1978) (footnotes omitted)

interest' standard is a task that Congress has delegated to the Commission in the first instance." [27]

> (b) On page 8 and on the following pages of the slip opinion, footnotes 24 through 95, inclusive, are renumbered footnotes 28 through 99, respectively.
>
> (c) On page 21 of the slip opinion, strike the first sentence of renumbered footnote 64 (formerly footnote 60).
>
> (d) On page 28 of the slip opinion, add to renumbered footnote 77 (formerly footnote 73), immediately after the period which follows the number "957," the following:

In setting aside the Commission's disposition of the diversification issue, we have taken the Commission's assumption as our own that the matter *is* relevant to a comparative renewal inquiry. *See* 62 F.C.C.2d at 956-57; 60 F.C.C.2d at 422; note 76 *supra; cf. FCC* v. *National Citizens Committee for Broadcasting*, 46 U.S.L.W. at 4617. We thus confine our objections to the *manner* in which the Commission analyzed the concededly relevant factor, not intending to prescribe the weight which the Commission generally should accord media concentration in the context of comparative renewal hearings. *See FCC* v. *National Citizens Committee for Broadcasting*, 46 U.S.L.W. at 4617, 4618.

And it is

FURTHER ORDERED, by the Court, that appellee's petition for rehearing is denied, for the reasons set forth in the *per curiam* panel opinion on rehearing filed herein this date.

Per Curiam

[27] *Id.* at 4618.

APPENDIX C

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1742

CENTRAL FLORIDA ENTERPRISES, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

COWLES BROADCASTING, INC., INTERVENOR

On Petition for Rehearing

Filed 12 January 1979

Before: ROBINSON and WILKEY, *Circuit Judges*, and FLANNERY,* *Judge*, United States District Court for the District of Columbia.

Opinion Per Curiam.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

The FCC and intervenors in this matter seek a rehearing, complaining *inter alia* that our opinion disregards the "legitimate renewal expectancies implicit in the structure of the [Communications] Act." [1] In light of the ambiguity of the phrase "renewal expectancies" and the frequency with which they are asserted to insulate an incumbent from license challenge, we think some clarification is called for, both generally and insofar as such an expectation may have been undercut in this case.

The content of the comparative proceeding at issue was governed by the Commission's 1965 Policy Statement; [2] however, the weight to be given findings under the various criteria was, as in all *renewal* proceedings, dependent upon the particular facts of the case. [3] The Commission renewed the incumbent's license after a hearing. It summarized as follows its rationale for doing so:

> Our conclusions in this regard do not mean—or suggest—that a challenger is denied an opportunity to show that a grant of his application will better serve the public interest. They do mean that a challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent. The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—

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[1] FCC Petition for Rehearing at 9 (citing *Greater Boston*, 444 F.2d at 854).

[2] *1965 Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965).

[3] *See Central Florida Enterprises, Inc.*, No. 76-1742 (D.C. Cir. 25 Sept. 1978), slip op. at 6; *Seven (7) League Productions, Inc.*, 1 F.C.C.2d 1597, 1598 (1965); *see also Belo Broadcasting Corp.*, 47 F.C.C.2d 540, 543-44 (1974).

> i.e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.[4]

We set aside the renewal. Our principal reason for doing so was that the Commission's manner of "balancing" its findings was wholly unintelligible,[5] based, it was said, on "administrative 'feel.'"[6] Admittedly, licensing in the public interest entails a good many discretionary choices, but even if some of them rest inescapably on agency intuition (not a comfortable idea),[7] we may at

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[4] 62 F.C.C.2d at 958 (emphasis original).

[5] Slip op. at 20.

[6] 60 F.C.C.2d at 422.

[7] As Judge Leventhal said, dissenting to an affirmance of an FCC comparative hearing award in *Star Television, Inc.* v. *FCC*, 416 F.2d 1086, 1089, 1094-95 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969):

> I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to 'demerits' in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible

least insist that they do not contradict whatever rules for choosing do exist. We think it plain that the Commission violated the rules. In our opinion we observed:

> the Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration and minority participation, and adversely to Cowles on the studio move question. Then simply on the basis of [a] wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy."[8]

The dispositive question is, of course, the relevance of the incumbent's past performance. We thought it relevant "only insofar as it predicts whether future performance will be better or worse than that of competing applicants."[9] From much of the Commission's language (apart from its holding), it appeared to agree.[10] We understand, of course, that it does not.[11] If we were correct, the Commission's decision cannot stand, for as we noted:

> Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its

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> hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes concerning intuition that outruns analysis. The possibility that an agency may come to the point of resting on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise.

[8] Slip op. at 20.

[9] Slip op. at 32.

[10] *See, e.g.*, 62 F.C.C.2d at 958 ("[A] challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent.") (emphasis original)

[11] *See* FCC Petition for Rehearing at 7.

future performance would be. But findings on integration and minority participation are evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger.*

. . . The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's. In fact, as we have noted, *Central prevailed on each of the questions supposedly predicting which applicant would better perform*—the same criteria which the Commission uses for this purpose in non-renewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practicable service.[12]

However, there is the possibility that an incumbent's meritorious record had literally untold significance. *If it were given enough weight* (entirely apart from predicting the future), as, for example, to assure industry stability, *the incumbent could conceivably prevail even were the challenger otherwise thought the better applicant.* There are probably many policies, more or less inferable from the "public interest" which might be balanced together with the predicted quality of programming.[13] We understand the Commission, in pressing renewal expectancies, to be concerned with the disincentive effects of uncertainty. It argues in its petition for rehearing:

> Moreover, under the panel's ruling, substantially-performing incumbents are deprived of the "renewal expectancies" which this Court in *Greater Boston* viewed as "ordinary", "legitimate", and "implicit in the structure of the Act." As the Court there explained, "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." Pursuant to these expectancies a "substantial" or "meritorious" past record is a relevant factor to be weighed in the incumbent's favor. In this sense, a "meritorious" past record deserves appropriate weight in the overall "public interest" determination, irrespective of the predictive value of past performance and, contrary to the panel's view (slip op. at 37), irrespective of any finding concerning the challenger's likely future performance.[14]

This, we admit, appears at least a plausible construction of the "public interest."

The trouble is, apart from several unenlightening recitals that there are expectations implicit in the Act, *there were few intimations that this was the Commission's inchoate rationale.*[15] Of course, even had we guessed, we could not have sustained the Commission by further speculating about the weight constructively given

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[12] Slip op. at 31, 32 (emphasis original).

[13] Diffusion of media ownership is in some sense such a policy.

[14] FCC Petition for Rehearing at 7 (footnotes omitted).

[15] *See, e.g.*, 60 F.C.C.2d at 422; 62 F.C.C.2d at 958. The FCC also suggests in its Petition for Rehearing, at 6, that our opinion precludes it from taking account of the natural "credibility" of even an "average incumbent's" proposals derived from the "common sense logic that substantial past performance is the most dependable indicator of substantial future performance." This is incorrect. We said "we do not see how performance that is merely average, whether 'solid' or not, can warrant renewal or, in fact, be of a special relevance without some finding that the challenger's performance would likely be no more satisfactory." Slip op. at 37. We plainly contemplated that the Commission would consider the likelihood of applicants effecting their proposals, as would be only sensible.

the incumbent's past performance.[16] Nor may we review a rationale presented for the first time in this court.[17] *The place for a new rationale in this case, if one is to be logically developed, is on remand.* Moreover, if through rule-making or adjudication the Commission decides to accord weight to such non-comparative values as industry stability, it will have to do so in a manner that is susceptible of judicial review. This would seem to require that the Commission describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria. Although mathematical precision is, of course, impossible, something more than the Commission's

[16] Thus, conclusory references to the need for industry stability are hardly a substitute for the statutorily mandated and particularized balancing.

[17] *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-89 (1943), *United States Lines, Inc.* v. *Federal Maritime Commission*, No. 76-2004 (D.C. Cir. 28 July 1978), slip op. at 26 & n.43.

[18] We recall that the Commission's license to define the public interest, although broad, is not unbounded. *See NAACP* v. *FPC*, 425 U.S. 662, 669 (1976) ("the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare," instead these words "take meaning from the purposes of the regulatory legislation"). Apart from the obvious limitations imposed by its subject matter jurisdiction, *see National Organization for Women* v. *FCC*, 555 F.2d 1002, 1017 (D.C. Cir. 1977), there may be subtler constraints "implicit in the structure of the Act." The Communications Act is very clear that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1976). The Act's disfavor of vested license rights reflects the need, which has long informed the public interest standard as well, for "diverse and antagonistic sources of information." *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 n.36 (1971). The point at which a renewal expectation would become an impermissible vested property right is a worrisome question about which we intimate no view.

customary recitals, "completely opaque to judicial review," must be provided. The choice of procedures through which an intelligible analysis could be composed is, as we have said, for the Commission.

Since the FCC petition for rehearing displayed a certain agitated concern that our decision in this case would destroy legitimate renewal expectancies of licensees, with baleful commercial consequences and harm to the general public, we thought it relevant to inquire of the Commission as to just how strong those renewal expectancies have been in the past, based on the action actually taken by the Commission and reviewing court.

The history of comparative renewal proceedings since 1 January 1961 (the date from which the data was requested) discloses that incumbents rarely have lost, and then only because they were disqualified on some non-comparative ground. From 1961 to 1978 the Commission has conducted seventeen comparative television license renewal proceedings, seven of which are still pending.[19] In only two cases did the incumbent lose its license,[20] and in *neither* of those cases were the comparative criteria the grounds of decision. In one case the incumbent was disqualified because of its fraudulent conduct,[21] and in

[19] Letter of Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of Appeals, District of Columbia Circuit, 11 December 1978.

[20] This does not include the much-publicized case of WHDH-TV, Boston, Massachusetts, which was treated as though it were a comparative proceeding between "new" applicants. *See Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971).

[21] *Western Communications, Inc. (KORK-TV), Las Vegas, Nevada*, 59 F.C.C.2d 1441 (1976), *reconsideration denied*, 61 F.C.C.2d 974, *aff'd. in part and rev'd and remanded in part sub nom., Las Vegas Broadcasting Co.* v. *FCC*, Nos. 76-2104

the other the incumbent failed to pursue its renewal application, so the challenger won by default.[22]

The story is not much different in radio licensing. No license has been denied on a comparative basis.[23]

Plainly, incumbents can "expect" in a statistical sense that their license will be renewed. We doubt that any realistic appraisal of the remand in this single case, calling upon the Commission to perform its duty in accord with its own expressed standards, could reasonably create the nervous apprehension among licensees claimed by the Commission. The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good.

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and 76-2124 (D.C. Cir., 26 October 1978) (affirming the denial of renewal but reversing the disqualification of the challenger).

[22] *Gerico Investment Co.*, 31 F.C.C. 625 (1961).

[23] From 1961 to 1978 there were thirty-one comparative radio renewal proceedings, twelve of which are still pending. No incumbent radio licensee has been displaced on the basis of the comparative criteria. Three licensees were disqualified for misconduct, five other renewal applications were dismissed, and the challengers' applications granted. See letters of Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of Appeals, District of Columbia Circuit, 11 and 13 December 1978.

APPENDIX D

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 76-1742

CENTRAL FLORIDA ENTERPRISES, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

COWLES BROADCASTING, INC., INTERVENOR

Before: WRIGHT, *Chief Judge*, BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

ORDER

Suggestions for rehearing *en banc* filed by appellee Federal Communications Commission and by intervenor Cowles Broadcasting, Inc., having been transmitted to the full court and no judge having requested a vote on these suggestions, it is

ORDERED, by the Court, *en banc*, that the suggestions filed by appellee and by intervenor are denied.

Per Curiam

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 FCC 73D-62
12035

In re Applications of:	)	
	)	
COWLES FLORIDA BROADCASTING, INC. (WESH-TV)	)	DOCKET NO. 19168 File No. BRCT-354
Daytona Beach, Florida	)	
	)	
For renewal of license	)	
	)	
COWLES FLORIDA BROADCASTING, INC. (WESH-TV)	)	DOCKET NO. 19169 File No. BPCT-4158
Daytona Beach, Florida	)	
	)	
For modification of authorized facilities	)	
	)	
CENTRAL FLORIDA ENTERPRISES, INC.	)	DOCKET NO. 19170 File No. BPCT-4346
Daytona Beach, Florida	)	
	)	
For a construction permit	)	

Appearances

Robert A. Marmet, Gordon R. Malick and *Jacob A. Stein* on behalf of Cowles Florida Broadcasting, Inc.; *Joseph F. Hennessey, Lee G. Lovett* and *Eric T. Esbenson* on behalf of Central Florida Enterprises, Inc.; *J. Peter Luedtke* and *Edgar F. Czarra, Jr.* on behalf of The Association of Maximum Service Telecasters, Inc.; *Gene A. Bechtel* on behalf of witness Robert M. Goshorn; *Clyde E. Herring* on behalf of witness Lester Suhler; and *Charles W. Kelley, Kathryn S. McGovern, Thomas B. Fitzpatrick* and *Theodore Kramer* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CHESTER F. NAUMOWICZ, JR.

Issued November 27, 1973; Released: December 7, 1973

Preliminary Statement

1. By Commission order released March 10, 1971 (redesignated by orders released August 20, 1971 and February 24, 1972), the above-captioned applications were consolidated for hearing on the following issues:

"1. With respect to the application of Central Florida Enterprises, Inc., to determine:

(a) The areas and populations which may be expected to gain or lose television coverage by the proposed operation, as compared to the service now provided by Station WESH-TV, and the other television broadcast services available to such areas;

(b) To the extent that there may be a loss area, what plans are proposed to ameliorate or eliminate actual losses and the efficacy of those plans;

(c) Whether circumstances exist that warrant a waiver of section 73.610(b) of the Commission's rules, and, if so, to determine the necessary conditions to be met to assure that equivalent protection is provided to Station WTHS-TV, channel *2, Miami, Florida;

(d) Whether the following subscribers to debentures of the applicant have sufficient current and

liquid assets in excess of current liabilities in sufficient amount to enable them to fully meet their commitments; H. Clinton Dunn, James W. Clower, O.L. White, Louis P. Samuels, Jos. A. Guernsey, J. Hyatt Brown, George W. Engram, William H. Cleveland, Arthur F. Jones, J.C. Adams, Jr., Fletcher G. Rush, and George P. Schanck;

(e) Whether Mr. James R. Stephen has current and liquid assets in excess of current liabilities in sufficient amount to enable him to meet his stock subscription commitment to the applicant;

(f) Whether the applicant will have available studio and transmitter buildings by lease from 749 Volusia, Inc., and, if so, the terms and conditions of that lease;

(h) What items will be covered by the equipment supplier's deferred credit;

(i) Whether the applicant will have available additional sources of funds to meet its requirements, and, if so, the terms and conditions under which those funds will be available;

(j) In light of the evidence adduced under issues "f" – "i", what the applicant's cost of construction and three-months operating expenses are;

(k) In light of the evidence adduced under issues "d" – "j", whether the applicant is financially qualified.

"2. With respect to the applications of Cowles Florida Broadcasting, Inc., to determine:

(a) The areas and populations which may be expected to gain or lose television coverage by operating as proposed in its application for changes, and other television broadcast services available to such areas;

(b) To the extent that there may be a loss area, the efficacy of the applicant's plans to ameliorate or eliminate actual losses;

(c) Whether circumstances exist that warrant a waiver of section 73.610(b) of the Commission's rules, and, if so, to determine the necessary conditions to be met to assure that equivalent protection is provided to Station WTHS-TV, channel *2, Miami, Florida;

(d) Whether the applicant has moved its main studio without prior Commission approval;

(e) [1] To determine the facts and circumstances (1) surrounding the criminal information proceeding relating to purported mail fraud by five wholly-owned P.D.S. magazine subsidiaries of the applicant's parent corporation, Cowles Communications, Inc., (2) surrounding the companion civil proceeding relating to purported nationwide fraudulent and deceptive practices by these same P.D.S. magazine subsidiaries, and (3) relating to the extent, if any, of the participation and/or responsibility of Cowles Communications, Inc., for the activities of its 5 P.D.S. magazine subsidiaries;

(f) In light of the evidence adduced under issues "d" and "e", whether the applicant has the requisite qualifications to be a licensee of the Com-

[1] The wording of issue 2(e) as quoted in the text above is that to which it was "corrected and/or amended" by order of the Review Board released October 26, 1971. The Board's order also made any grant to Cowles in this proceeding without prejudice to whatever action the Commission might deem appropriate as a result of certain pending proceedings initiated by the Federal Trade Commission, and several states involving Cowles' Communications P.D.S. subsidiaries.

mission, or whether it should be given a comparative demerit or demerits;

(g) Whether a grant of the application for changes would constitute a *de facto* reallocation of Channel 2 from Daytona Beach to Orlando, Florida;

"3. To determine which of the proposals would better serve the public interest.

"4. To determine, in light of the evidence adduced pursuant to the above issues, which of the applications, if any, should be granted."

2. The applicants published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Conferences and hearings were held on various dates between April 20, 1971 and June 15, 1973 with the record being finally closed on the later date. The filing of proposed and reply findings was concluded on October 5, 1973.

Findings of Fact

Issues 1(a) and 2(a): Areas and Populations

3. Central proposes to locate its transmitter some 12.5 miles southeast of Cowles' present site and quite close to the new site proposed by Cowles. The areas and population which would be gained and lost relative to the present WESH-TV operation are as follows:

	Population		*Area (Sq.Mi.)*	
	Central[2]	*AMST*[2]	*Central*	*AMST*
GradeA:				
Gain	---	70,221	---	837
Loss	---	6,288	---	302
Net Gain	---	63,933	---	517
Grade B:				
Gain	184,133	187,912	1,361	1,186
Loss	13,800	23,136	458	461
Net Gain	170,333	164,776	903	725

[2] [See following page]

4. In determining the population within the proposed Grade B loss area Central's engineer employed two techniques. Throughout part of the area he conducted an actual house count, and determined population by applying the factor of persons per dwelling unit obtained from the 1960 U.S. Census.[3] Throughout portions of the loss area which were difficult to reach population was determined by using the equal distribution of population method using 1970 census figures. Of his total figures 64% of the population lost was computed by the house count method, and 36% by the equal distribution of population method.

5. Other services available within Central's gain and loss areas are as follows:

Number of	*Population*		*Area (Sq.Mi.)*	
Existing Services	*Central*[2]	*AMST*[2]	*Central*	*AMST*
Grade A gain				
1	---	70	---	8
2	---	98	---	5
3	---	70,053	---	824

[continued]

[2] Engineering studies were offered by both Central and The Association of Maximum Service Telecasters, and the conclusions reached involved noticeable, if not decisionally significant, discrepancies. The disagreement, at least insofar as to population within the loss area, is attributable in part to the mixture of methods described at paragraph 4, *infra*, used by Central's engineer in counting population. However, the results reached by both engineers are included in the text above primarily to illustrate that the measurement of areas and populations within a proposed contour is not an exact science, but is an art which can lead practitioners of acknowledged competence to differ.

[3] 1970 U.S. census data was not then available. Since there was little change in the numbers of persons per dwelling between the 1950 and 1960 census counts he assumed that there would also be little change between 1960 and 1970, although he acknowledged that an error of 5% might be introduced. However, the record is not clear why the possible error must be limited to 5%.

Number of	*Population*		*Area (Sq.Mi.)*	
Existing Services	*Central*[2]	*AMST*[2]	*Central*	*AMST*
Grade A loss				
0	---	3,777	---	237
1	---	1,040	---	72
2	---	1,471	---	11
Grade B gain				
3	59,009	66,319	429	460
4 or more	125,124	121,593	932	726
Grade B loss				
0	90	666	12	17
1	967	2,676	97	101
2	296	545	17	19
3	7,152	13,147	90	110
4	5,295	6,102	242	214

6. Central proposes to continue WESH's NBC network affiliation. If that proposal is effectuated it would provide a first NBC affiliated Grade B signal to 59,116 persons in an area of 518 sq.mi. located 57 to 73 miles south of the proposed site. One hundred seven persons residing in 27 sq.mi. located 80 miles west of the proposed site would lose their only NBC affiliated Grade B service.

7. Cowles' transmitter is now located some 21 miles southwest of Daytona Beach and 25 miles north of Orlando. It proposes to move 12.7 miles southeast to a location 22 miles south of Daytona Beach and 21 miles

[2] [See previous page]

northeast of Orlando. The areas and populations which would be gained and lost are as follows:

	Population		*Area (sq.Mi.)*	
	Cowles[4]	*AMST*[4]	*Cowles*	*AMST*
Grade A				
Gain	---	118,132	---	943.4
Loss	---	8,424	---	254.1
Net Gain	---	109,708	---	689.3
Grade B				
Present	1,107,443	---	10,856	---
Proposed	1,295,857	---	12,042	---
Gain	200,702	188,941	1,587	1,303.5
Loss	12,288	15,639	401	399.6
Net Gain	188,414	173,302	1,186	903.9

8. The present WESH City Grade contour (74 dbu) covers 94% of the population of Daytona Beach and 45% of the population of Orlando. The proposed City Grade contour would include all of both cities.

9. Other services available within Cowles' gain and loss areas are as follows:

Number of	*Population*		*Area (Sq.Mi.)*	
Existing Services	*Cowles*	*AMST*	*Cowles*	*AMST*
Grade A Gain				
1 and 2	---	144	---	5.1
3	---	117,988	---	938.3
Grade A Loss				
0	---	3,391	---	144.8
1	---	1,529	---	98.4
2	---	3,504	---	10.9
Grade B Gain				
2	841	1,411	25	30.6
3	44,274	62,481	578	553.3
4 or more	155,587	125,049	984	719.6

[4] Here, as with the Central figures under this issue, AMST's computations differ noticeably, if not materially, from the computations of the applicant.

	Population		Area (sq.Mi.)	
	Cowles[4]	AMST[4]	Cowles	AMST
Grade B Loss				
0	540	625	11	22.2
1	2,792	3,433	111	128.0
2	628	572	25	24.8
3	3,780	5,936	57	98.1
4	4,548	5,073	197	126.5

10. At present there is a 36° spread in antenna orientation for residents of Daytona Beach between the WESH transmitter and the transmitter locations of Orlando VHF stations WDBO-TV and WFTV. At the new location the spread would be reduced to 9.5°, thus permitting reception from all three stations on a single antenna setting. Since Central's proposed site is quite close to that of Cowles, a similar advantage would flow from grant of its application.

Issue 1(b) and 2(b): Plans to Ameliorate Signal Loss

11. Central proposes to call upon all the homes in the loss area which have antennas oriented toward Daytona Beach. An adult member of the household will be questioned regarding reception on Channel 2. If the response is that the signal has become less satisfactory, Central will offer to have a higher gain antenna installed at its own expense.

12. It is the opinion of Cowles' consulting engineer that no actual loss of Cowles' existing service will occur. He bases this opinion on the fact that, although certain areas now within the Grade B contour would no longer be within such contour, the maximum decrease in signal strength would be 3 db. He believes that so minor a diminution of signal strength would be undetectable on a typical television receiver.

13. Nevertheless, Cowles proposes to place notices of the change in local newspapers and Post Offices. If anyone in the loss area believes he has suffered an actual loss of signal Cowles will install a special antenna for such persons with a higher gain on Channel 2. In the event a substantial number of persons claim to be effected, Cowles proposes to restore service through translators. Pursuant to that proposal there is now pending an application by Cowles for a Channel 64 translator to serve McIntosh, Florida, a community of 287 persons located within the loss area.

Issue 1(c) and 2(c): Short Spacing

14. Under rules 73.609 and 73.610 the minimum separation for co-channel VHF stations in the state of Florida is 220 miles. Prior to September of 1959 the transmitter sites of WESH and WTHS-TV, Channel 2, Miami, Florida, were separated by 228 miles. However, on that date the Commission, with the consent of WESH, permitted WTHS to move its transmitter to a site only 215 miles from that of WESH. Since that time the stations have been short-spaced by 5 miles.

15. The distance from Central's proposed site to that of WTHS-TV is 206.5 miles. Hence, it would be short-spaced by 13.5 miles, an increase of 8.5 miles in comparison with the present WESH site.

16. Central's reason for selecting its site was to enable it to provide coverage comparable to that of the stations which would be its competitors, WFTV and WDBO-TV, Orlando, Florida. In order to achieve this goal Central believes it needs antenna height equal to the approximately 1500 feet from which its competitors operate. So tall a tower presents aeronautical hazards which limit the locations at which it can be erected. The only suitable

site, other than the one proposed, is in a swamp area some 30 miles west of Daytona Beach. However, Central rejected this site because it is further from the transmitter location of the Orlando stations, and would, therefore, make its coverage even less comparable to that of the Orlando stations than that of present WESH.

17. Central proposes a directional antenna designed to suppress radiation toward WTHS-TV. Central's engineer conducted a study indicating that at least equivalent protection will be provided on all pertinent radials. His conclusions were as follows:

	Effective Radiated Power (dbk)	
Azimuth (degrees true)	*Permissible*	*Central*
149	17.0	16.5
158	16.7	16.03
170	16.7	16.03
179	17.0	16.71
183	17.2	16.83
185	17.3	17.05
187	17.3	17.27
188	17.4	17.38

18. In addition to its directional antenna Central proposes, with the concurrence of Station WTHS-TV, to install precise frequency control equipment. It believes this will result in a further reduction of interference on the order of 7 to 10 db. Moreover, to make certain that its transmitter will operate as proposed Central will have its antenna measured on the pattern range of the antenna manufacturer. There appropriate match marks will be applied to the antenna to assist antenna orientation in the field. After erection, orientation will be confirmed by a registered surveyor, and sufficient field intensity measurements will be taken to insure that installation was proper.

19. Cowles' existing transmitter site is 215 miles from co-channel Station WTHS-TV, Miami, Florida. Hence, as noted at paragraph 14, *supra,* the two stations are presently short spaced by 5 miles.[5] Its proposed move would decrease the spacing to 205.29 miles. Thus, short-spacing would be increased by 9.7 miles to a total of 14.7 miles.

20. Cowles' reason for seeking to move its site is to reestablish a competitive position with the Orlando VHF stations which were permitted to move to their present location some time ago.

21. In order to provide city-grade service to all of both Daytona Beach and Orlando Cowles must locate its transmitter within an ellipse containing some 200 square miles. Within that ellipse there is an area of some 4 square miles which would meet the 220 mile separation requirement of the rule, and another area of approximately 40 square miles wherein the separation would be at least as great as the present 215 miles. However, considerations of air hazard preclude locating a tower of sufficient height within these areas.

22. A third area of some 40 square miles within the ellipse presents no air hazard problems, but the entire area is less than 215 miles from the WTHS transmitter. It is within this area that Cowles and Central propose to locate their transmitters.

23. Cowles proposes a directional antenna designed to suppress radiation toward WTHS-TV. However, there is some controversy as to whether its proposal would pro-

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[5] If WTHS had not moved its transmitter site in 1959 there would now be a distance of 219 miles between WTHS and the WESH proposed site. WTHS does not now object to WESH's proposed increase in short spacing presumably as a *quid pro quo* for WESH's lack of objection in 1959.

vide WTHS with equivalent protection, the controversy stemming from which is meant by the term "equivalent protection".

24. Cowles concedes that its antenna pattern would not provide equivalent protection as defined in Docket 13340, which is based on the assumption that the two stations are located at least 220 miles apart. If this standard is applied the following table illustrates the permissible radiation on the pertinent radials as compared to that proposed by Cowles:

	Effective Radiated Power (dbk)	
Azimuth (degrees true)	*Permissible*	*Cowles*
149	17.0	17.8
158	16.7	17.2
170	16.7	17.0
179	17.0	17.6
183	17.2	17.9
185	17.3	18.1
187	17.3	18.3
188	17.4	18.4

25. However, Cowles contends that WTHS is not entitled to "equivalent protection" based on a 220 mile separation. It points out that the existing separation is actually 215 miles, and that this situation exists because WTHS was permitted to short space its own transmitter. Hence, Cowles reasons, WTHS is only entitled to "equivalent protection" to the extent that its interfering signal is no stronger than that which WTHS receives at the existing 215 mile separation. This degree of protection its proposed antenna pattern would provide, and, in fact,

WESH's interference to WTHS would be reduced, as follows:

	Population	*Area (Sq.Mi.)*
WTHS Grade B	2,215,981	6,360
Interference from Present WESH	107,220 (4.8%)	836 (13%)
Interference from Proposed WESH	4,807 (0.22%)	137 (0.22%)

26. In addition, Cowles proposes to install precision frequency controls at both its own transmitter and that of WTHS. Its antenna will be range measured by the manufacturer, and field measurements will be made after installation to assure that the anticipated protection to WTHS will actually occur.

27. Finally, Cowles proposes that, in the event the Commission determines that the equivalent protection standards of Docket 13340 should be applied, it will accept a grant conditioned on its amending its proposal to supply such protection. Ordinarily, such contingent applications are discouraged and no findings thereon would be made. However, in this instance it must be noted that the order of designation provides that "in the event Central does not establish that waiver of the spacing requirement is warranted, but would otherwise be the preferred applicant, its application will be granted subject to the condition that it find a transmitter location that does not lessen the existing spacing between Stations WESH-TV and WTHS-TV". If one applicant is to be permitted to amend its application after hearing to conform its spacing proposal relative to WTHS with that of its opponent, elementary justice would seem to require that the opponent be afforded a similar opportunity. Hence, the findings as to Cowles contingent proposal have been

made, and the matter will be accorded appropriate consideration in the conclusions.

Issue 1(d): Ability of Central Principals to Meet Debenture Commitments.

28. H. Clinton Dunn is committed to purchase $21,000 of Central's debentures. The First Atlantic National Bank of Daytona Beach has committed a loan to Mr. Dunn in the sum of $25,000, at call, to permit him to meet this obligation in the event Central receives a grant. Interest will be at the bank's then prime rate, and no security will be required.

29. James W. Closer is committed to purchase $10,500 of Central's debentures. The Westside Atlantic Bank of Daytona Beach has committed a loan to Mr. Clower in the sum of $10,500, at call, to permit him to meet this obligation in the event Central receives a grant. Interest will be at the bank's then prime rate, and no security will be required.

30. O.L. White is committed to purchase $21,000 of Central's debentures. The First National Bank of Maitland, Maitland, Florida has committed a loan to Mr. White in the sum of $25,000, at call, to permit him to meet this obligation in the event Central receives a grant. The bank's interest on this type of loan is currently 7%. No security will be required.

31. Louis P. Samuels is committed to purchase $21,000 of Central's debentures. The Westside Atlantic Bank of Daytona Beach has committed a loan to Mr. Samuels in the sum of $21,000, at call, to permit him to meet this obligation in the event Central receives a grant. Interest will be at the bank's then prime rate, and no security will be required.

32. Joseph A. Guernsey is committed to purchase $21,000 of Central's debentures. The Commercial Bank of Winter Park, Florida, has committed a loan to Mr. Guernsey in the sum of $21,000 to permit him to meet this obligation. The loan will become available at such time as Central may have received a construction permit. The loan commitment is presently available through March 8, 1974. However, in the event it should expire before the termination of this hearing, the record shows that as of August, 1972 Mr. Guernsey had approximately $300,000 in current liquid assets in excess of all liabilities from which to meet his obligation to Central.

33. J. Hyatt Brown is committed to purchase $21,000 of Central's debentures. The Commercial Bank of Daytona Beach has committed a loan to Mr. Brown in the sum of $22,000, at call, to permit him to meet this obligation in the event Central receives a grant. Interest will be 1¾% above the then New York prime rate, and no security will be required.

34. George W. Engram is committed to purchase $10,500 of Central's debentures. The Florida Bank and Trust Company of Daytona Beach has committed a loan to Mr. Engram in the sum of $10,500 in order that he may meet his commitment. The loan will be secured by a mortgage on certain real property which Mr. Engram has set aside in order that it will be available at such time as the security may be needed.

35. William H. Cleveland has assigned his interest in Central to W. Warren Cole including the obligation to purchase $21,000 of Central's debentures. Mr. Cole has current liquid assets in excess of $100,000, and his liabilities total less than $7,000.

36. Arthur F. Jones is committed to purchase $21,000 of Central's debentures. As of December, 1971 he owned publicly traded securities valued at approximately $250,000, and his total liabilities were less than $11,000.

37. J.C. Adams, Jr. is committed to purchase $21,000 of Central's debentures. The Westside Atlantic Bank of Daytona Beach has committed a loan to Mr. Adams in the sum of $21,000, at call, to permit him to meet this obligation in the event Central receives a grant. Interest will be at the bank's then prime rate, and no security will be required.

38. Fletcher G. Rush is committed to purchase $21,000 of Central's debentures. The Commercial Bank of Winter Park, Florida has committed a loan to Mr. Rush in the sum of $21,000 to permit him to meet this obligation. However, the bank's commitment expires on March 2, 1974. Mr. Rush's unaudited financial statement of November, 1971 indicates that he has current liquid assets of more than $300,000 in excess of current liabilities, but over $450,000 of these assets are in the form of unnamed securities.

39. George P. Schanck is committed to purchase $21,000 of Central's debentures. The Citizens National Bank of Orlando, Florida has committed a loan to Mr. Schanck in the sum of $21,000, at call, to permit him to meet this obligation. Interest will be at the bank's then prime rate, and no security will be required.

40. Although the Order of Designation does not inquire as to Thomas W. Staed at Issue 1(d), he is mentioned at paragraph 11 of the Order as not having demonstrated that his liquid assets exceed his current liabilities by the amount of his $21,000 commitment to purchase Central's debentures. Hence, evidence as to his capability was adduced, and findings will be made.

41. The First Atlantic National Bank of Daytona Beach has committed a loan of $21,000 to Mr. Staed to permit him to meet his obligation in the event Central receives a grant. Interest will be at the bank's then prime rate, and no security will be required.

Issue 1(e): Financial Qualifications of James R. Stephen

42. James R. Stephen has subscribed to $125,000 worth of Central's stock and $10,500 of debentures. The Commercial Bank of Daytona Beach has agreed to lend him $150,000 to meet his commitment. The bank has agreed to refinance a mortgage it now holds on certain of Mr. Stephen's property as full security for the loan. The loan would be for 15 years at 6½% interest, payable at $3,100 per month. The property is presently under a 15-year lease that returns $4,000 per month to Mr. Stephen.

Issue 1(f): Availability of Bank Loan to Central

43. The issue as designated inquires whether Central will have available a $100,000 loan from the Commercial Bank of Daytona Beach. Subsequently, the application was amended to specify a loan in the sum of $800,000 from the Empire Bank, Springfield, Missouri. The Empire Bank has agreed to make this sum available at such time as Central may have received a grant. The bank's commitment contemplates a three-year loan at 8%. The loan would be unsecured by Central. However, the bank may require that all of the shareholders pledge their stock in Central, and that guarantees to a total of $150,000 be given.

44. Each of Central's shareholders has agreed to pledge his stock if required. Mr. Jack Ross and Mr. James Stephen have each agreed to guarantee $75,000 on the loan, and the Empire Bank finds their guarantees to satisfy the

$150,000 contingent surety. The bank's commitment is subject to the usual caveat that changed conditions at the time the loan is to be taken down may modify the agreement. The bank proposes to sell participation in so much of the loan as may exceed $500,000. However, the bank's President is of the opinion that such a participation agreement is common, and that the bank can properly expect to honor its commitment. The bank would not require any principal payment during the three-year term, although interest will be payable monthly.

Issue 1(g): Availability of Studio and Transmitter Buildings

45. 749 Volusia, Inc. is a real estate holding and development corporation owned in equal shares by its president, James R. Stephen, and its secretary-treasurer, Richard F. Livingston. The corporation has agreed to build a studio and lease it to Central.

46. Central has an option running to April 30, 1976 to purchase a 5 acre site in a business park being developed in the western portion of Daytona Beach. The option does not specify the precise 5 acres to be acquired by Central nor the exact price to be paid, although it is specified that the 5 acres will front on a named street and that the price will not exceed $12,000 per acre. At such time as Central may receive a grant it would exercise the option and reconvey the property to 749 Volusia at its own purchase price.

47. 749 Volusia would then build on the site a studio building containing approximately 30,000 square feet of space. The building would cost between $750,000 and $1,000,000. It would be leased to Central for not less than 10 years at a rate of 7½% "over the best financing available for construction of the studios at the time of

making arrangements for the mortgage, computed on a basis of total costs of construction of studios and land acquisition".[6] Central will also pay all taxes and costs for operating and maintaining the property.

48. By a separate agreement the parties have arranged that 749 Volusia will also build and lease to Central the building at the transmitter site. The cost would approximate $50,000, and the terms of the lease would be the same as those covering the studio building.

49. 749 Volusia has made arrangements with the Barnett Bank at Ormond Beach for a mortgage to construct the proposed studio building. The bank will loan up to 65% of the total cost of the land and building, said total cost not to exceed $1,000,000. The interest rate would be prime plus 2½% with amortization to be in even monthly payments for a period not to exceed 10 years. The note would be endorsed by Messrs. Stephen and Livingston and their wives.

50. Assuming the top estimate of $1,000,000 in construction cost, and a bank loan of $650,000, 749 Volusia will need an additional $350,000 in order to build Central's studios. As of May, 1972 the corporation had approximately $20,000 of current liquid assets in excess of current liabilities. However, both Mr. Stephen and Mr. Livingston have committed themselves to personally provide the excess funds needed, and each man has demonstrated his ability to meet his commitment.

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[6] Although the quoted language is not free of ambiguity, the parties apparently intended that Central will service the mortgage loan to be obtained by 749 Volusia and also make annual payments of 7½% of that sum by which 749 Volusia's capital investment exceeds the mortgage placed on the property.

51. As of November, 1972 Mr. Livingston's balance sheet showed more than $1,000,000 of current liquid assets in excess of liabilities. Mr. Stephen has a line of credit from the Commercial Bank of Daytona Beach in the total sum of $950,000. Some $550,000 of that line of credit is currently in use or committed, leaving approximately $400,000 available for a loan to 749 Volusia, Inc.

Issue 1(h): Equipment Credit

52. By letter of August 21, 1971 RCA wrote to Central offering the following credit terms on approximately $1,900,000 worth of equipment:

> "25% of the total price prior to shipment;
>
> 75% deferred balance to be payable in 48 successive equal monthly installments beginning 12 months after shipment of equipment valued at 50% of the total price has been shipped to you. Interest will accrue from the date of shipment and will be at our then current rate. For your information, our current rate is 6% add-on (finance rate)."

The 12-month moratorium on payment applies to both principal and interest.

53. Central's consulting engineer estimates that $1,863,000 worth of equipment will be needed as follows:

(1) Transmitting equipment (including 25-kilowatt transmitter, with spare tubes); antenna (six-bay); 1,400 foot tower (erected); r f load; and auxiliary and test equipment	– $683,000
(2) Studio equipment, including live cameras (three color chains); color camera island; film editing equipment; terminal equipment; video tape (two studio plus one portable); lighting, audio and test equipment	– $789,00
(3) Microwave equipment (dual STL link)	– $ 36,000
(4) Remote pickup van (with two color cameras; switching; audio; microwave; lighting; power supply; and air conditioning	– $300,000
(5) Miscellaneous equipment, including film and still cameras; remote radio equipment; and auxiliary generator	– $ 55,000

Issue 1(i): Additional Funds Available to Central

54. Central proposes no funds other than discussed heretofore.

Issue 1(j): Central's Total Costs

55. Central will need $465,750 down payment on its equipment. Its consulting engineer estimates that installation costs will be $216,400. This figure is 20% of equipment cost exclusive of tower, the installation of which is included in its own cost estimate. He bases his estimate, which he regards as conservative, on 20 years of experience involving the construction of 15 to 20 television stations, as well as on his study of pertinent technical publications.

56. Central's consulting engineer also estimates that Central will need some $80,000 worth of office furnishings and equipment. Central has made arrangements to lease that value of office equipment for $1,800 a month, plus tax. The lease would require the last two months rental in advance. Central has also arranged to lease the 5

automobiles it would need for $750 per month, plus tax and insurance.

57. Central's broadcast consultant has estimated that the applicant's legal and engineering fees would approximate $185,000. He based this estimate on consultations with the attorneys and engineers involved.[7] He estimated miscellaneous costs, including grant fee and start-up costs, at $212,000. He also estimated Central's 3-month operating costs to be $360,000. Finally, he estimated that Central's various lease expenses heretofore discussed would run to $65,382 through the first three months of operation. His ultimate estimate is that total construction and 3-month operating costs would be $1,504,532. However, as noted at footnote 7, *supra*, Central has since increased its estimate for professional fees by $115,000. Thus, its present estimated cash requirement is $1,619,532.

Issue 1(k): Central's Ultimate Financial Qualifications

58. Central shows the following sums to be available to meet its need for $1,619,532 in construction and three-month operating costs. It has $240,000 cash on hand as noted at paragraph 10 of the Order of Designation. Mr. E. William Crotty has shown an ability to purchase $125,000 in stock as noted at paragraph 12 of the Order of Designation. At paragraph 42, *supra*, Mr. James R. Stephen has been found able to purchase $125,000 of Central's stock. At paragraphs 28-42, *supra*, various individuals have been found able to purchase an aggregate of $420,000 of Central's debentures. Since the release of the Order of Designation Mr. Jack Ross has acquired an

[7] Central subsequently amended its application to specify $300,000 in professional fees.

interest in Central and has agreed to purchase $30,000 of its debentures. Mr. Ross is shown to have a net worth in excess of $2,000,000, with over $100,000 cash on hand to meet his commitment. At paragraphs 43-44, *supra*, an $800,000 bank loan has been found to be available. Finally, the record shows that as of September, 1972, something over $20,000 interest had been earned by certificates of deposit held by Central. Thus, Central shows the availability of a total sum of $1,760,000.

Issue 2(d): Main Studio

59. Since Cowles contends that its pattern of studio usage stems in large part from historic and technical considerations, findings as to the history of the development of the WESH facilities are appropriate.

60. Since 1957, when WESH-TV was owned by Telrad, Inc., the station has been the NBC affiliate in the Orlando-Daytona Beach market. The network service has been and is fed to WESH off a heavy backbone microwave route of Southern Bell which, insofar as here pertinent, runs between repeater stations at DeLeon Springs, some 20 miles west of Daytona Beach, and Orlando, which is approximately 45 miles southwest of Daytona Beach. Between 1957 and 1960 the network service was microwaved by Southern Bell from DeLeon Springs via light duty equipment to WESH's Holly Hill studios which are located just outside of Daytona Beach. From there WESH employed its own microwave system to transmit the signal to its Orange Park transmitter site some 21 miles to the southwest of Daytona Beach.

61. However, the routes from DeLeon Springs to Holly Hill and from Holly Hill to Orange Park pass over large areas of swampland. Microwave passage over large bodies of standing water is subject to fresnel bending which

causes deep microwave fades. Consequently, fading was common. There were disputes between WESH and Southern Bell as to whether the fading was occurring on the Southern Bell or the WESH portions of the route, but in any event, the service was unsatisfactory.

62. Hence, in June of 1960 Telrad modified its pickup to receive the NBC service from Southern Bell's Orlando repeater rather than from DeLeon Springs. In the meantime, in May of 1960 the Commission had waived the station identification rules to permit WESH to identify itself as a Daytona Beach-Orlando station.[8] Telrad had then built auxiliary studios at Winter Park just outside of Orlando. It was to these new studios that the network service was microwaved from Southern Bell's Orlando repeater, and from there over a WESH microwave to Orange Park. This system eliminated the over-swamp microwave hops from DeLeon Springs to Holly Hill and from Holly Hill to Orange Park.

63. This was the system which Cowles took over when it acquired WESH-TV from Telrad in May of 1966, and it is the system, somewhat modified, which is still in use. It is the system which Cowles contends has dictated many of the developments hereinafter described.[9]

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[8]The Commission emphasized that it was not modifying WESH's license to change the city of assignment, or relieving it of its obligation to serve Daytona Beach as its principal city.

[9]In 1964 Southern Bell installed heavy duty microwave from DeLeon Springs to Daytona Beach. Hence, the route used by Telrad prior to 1960 would be less unsatisfactory today than it was when it was in use. However, in order to receive service comparable to that rendered at Orlando it would be necessary for Southern Bell to install a television operating center at Daytona Beach, and the service would still not be as flexible because the telephone company has a capacity at Orlando, which it would not have at Daytona Beach, to switch to spare channels in times of need. Moreover, microwave fade could still be anticipated on the over-swamp path of the WESH system from Holly Hill to Orange Park.

64. The physical plant which Cowles acquired when it purchased WESH included land approximately 400 feet square with a building containing some 4,600 square feet of studios and offices at Holly Hill. At Winter Park the land was some 170 feet by 140 feet containing some 7,200 square feet of studio and office space. There was also an adjoining residence on the Winter Park property containing some 1,000 square feet of floor space.

65. However, since Cowles has operated WESH it has made substantial improvements in the station's technical capability. In 1969 the station was converted from black and white to color. This involved substantial changes at both the Holly Hill and Winter Park studios. The refurbishment of the Winter Park studios was undertaken first, apparently for the primary reason that the bulk of local commercial production is done on behalf of advertisers based in Orlando and WESH wanted to have local commercial color capacity as soon as possible. The Holly Hill studio was converted immediately thereafter.[10]

66. Additional technical improvements of possible relevance to this issue include:

(a) Converted from black and white film facilities at Holly Hill studios by purchase and installation of GE #PE 240 color film chain including Eastman #275 film projectors and RCA Carousel Slide Projector.

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[10]The Holly Hill studio was shut down during renovation whereas the Winter Park studio was not. However, this point lacks significance. The Winter Park studio has two production centers, one a network production room, but either able to handle both network and local production. Thus, one could be used while the other was being remodeled. Holly Hill, on the other hand, has only one production center and could not remain in operation during renovation.

(b) Doubled color film facilities at Winter Park studio by adding second GE #PE 240 film chain, two Eastman film projectors and RCA Carousel slide projectors.

(c) Installed new vertical interval video switching equipment at both the Holly Hill and Winter Park studios.

(d) Installed new sync generators and processing amplifiers equipment at both studios and transmitter site.

(e) Installed 50 new monochrome and color video monitors and wave form monitors at all locations.

(f) Installed four color video tape machines.

(g) Installed three new microwave studio transmitter links: Holly Hill to Orange City; Winter Park to Orange City; and Orange City to Winter Park.

(h) Constructed and equipped color film processing laboratories at both studios.

(i) Installed remote facilities to accommodate live weather reports between the U.S. Weather Bureau station at Volusia County regional airport and the Holly Hill studio.

(j) Expanded, remodeled and refurbished office and studio facilities in Holly Hill and Winter Park.

(k) Added outside studio at Holly Hill.

(l) Contracted an addition to Holly Hill studio building, 20 feet by 73 feet, to increase outside dimensions of structure to 90 feet by 73 feet.

(m) Constructed a shipping and receiving work area in a house located on the Winter Park studio property.

67. As of October 1969 Cowles valued its buildings, furniture and equipment at $1,937,000. Of that sum 59% was attributed to the Winter Park studio, 15% was attributed to Holly Hill, and the balance was attributed to the transmitter site.

68. When Cowles purchased WESH 23 full-time and one part-time employees were working out of Holly Hill and 35 full-time and 5 part-time employees were assigned to Winter Park. By February 1, 1970 Holly Hill employment was down to 19 and Winter Park jobs were up to 62, eight of them part-time. The higher executives of the station are split up between the two cities as follows: at Winter Park are the General Manager, the News Director, the Sports Director, the Chief Meteorologist, the Operations Manager, a Production Manager, the Chief Engineer, and the General Sales Manager; at Holly Hill are the Station Manager, the Director of News and Public Affairs, the Daytona Beach News Director, the Sports Director, the Comptroller and Business Manager, a Production Manager, and the Daytona Beach Sales Representative.

69. Cowles attributes the greater employment at the Winter Park "auxiliary" studios than at the Holly Hill "main" studio to two factors. First, is the necessity for extra employees at the network reception point, both in connection with actual network operations and in connection with local productions integrated into network programs. Second, is the fact that some 80% of the station's local advertising revenues are generated in the Orlando area.[11]

70. Ever since Cowles acquired WESH there has been a top level consciousness of the significance of Orlando

[11] Orlando is approximately twice the size of Daytona Beach, and serves as the economic hub of central Florida.

to the station's fortunes. At the time Cowles took over Thomas S. Gilchrist was, and remained, General Manager. His offices were in Daytona Beach. In July of 1967 Cowles' then President, Robert Tincher, suggested that Gilchrist relocate his offices in Orlando, since Tincher regarded Orlando as the more important part of the station's service area. Tincher's view was shared by Charles B. Brakefield who succeeded him in May of 1968, and Gilchrist eventually did move his office to Orlando.

71. Although the recollections of Gilchrist and Brakefield differ as to what followed, in September of 1968 Brakefield asked for Gilchrist's resignation. At least part of his reason was because Gilchrist had failed to sufficiently involve himself and the station in the community affairs of Orlando. At the present the highest ranking CFB executive on the scene, John M. Haberlan, President and General Manager, maintains his office in Winter Park.

72. The record does not contain a complete breakdown of local programming by point of origin for the entire last license period.[12] However, all programs for the

[12]At paragraph 124 of its Proposed Findings of Fact Cowles asserts that between 1967 and 1970, 72% of its local programming was produced at Holly Hill, citing its exhibit No. 15A in support of that claim. In a Petition for Leave to Supplement Findings of Fact filed on September 14, 1973 [granted by Order released October 2, 1973] Cowles acknowledged that "Exhibit 15A does not alone support the findings in Paragraph 124", but argued that the finding was supported by 11 other exhibits and certain testimony. On October 3, 1973 Cowles filed a pleading titled Reply to Opposition to Petition for Leave to Supplement Findings of Fact which purports to explain how the cited exhibits and testimony, read in conjunction, establish with reasonable precision the percentages of local programming originated in both or either of its studios throughout the last license period. However, examination of the cited portions of the record reveals that much of the evidence consists of mere estimates or approximations and does not even purport to be complete. Hence, the finding in the text above that the record does not contain a breakdown of local programming by point of origin for the entire license period.

first four weeks of January 1970 were analyzed. During that period a total of 3,787 minutes of local programming were broadcast. The great bulk of the programming, 2,348 minutes, consisted of news shows presented live with portions originating in Holly Hill and other portions originating in Winter Park. There is no breakdown of these 2,348 minutes by point of origin. Of the remaining 1,439 minutes 807 were presented from Winter Park and 632 originated in Holly Hill.

73. Of the 807 minutes originating in Orlando 195 minutes involved two 5-minute local news segments within the morning network program "Today". Cowles suggests that it was necessary that these originate at the network reception point because of the coordination required between the newscaster and the director – switches on the shifts back and forth between network and local portions of the program. However, Cowles does not explain why the switching on this program should present greater problems than the switching on the news program which involve the use of both studios and which make up the majority of the station's local programming. It is found that the actual reason why the local news segments on the "Today" show are broadcast from Winter Park rather than Holly Hill is because at that hour of the morning the "auxiliary" studio is manned whereas the "main" studio is not.

74. The record also contains evidence as to the place of production of several local program series. "Topic" is a weekly half hour public affairs program which was broadcast 141 times during the last license period. One hundred twenty-six (89%) of the programs were pro-

duced at Holly Hill, and fifteen (11%) were produced at Winter Park.[13]

75. "On Camera Two" is a live 3-5 minute program broadcast within the early edition of WESH's evening news show. During the last license period it was broadcast 47 times, twenty-nine (62%) of the programs being produced at Winter Park, and eighteen (38%) at Holly Hill.

76. "2-Day, 2-Night, 2-Morrow" was a program scheduled for the last 5 minutes of the 12:30-12:55 p.m. newscast. Between February 24, 1969 and January 30, 1970 the program was broadcast 148 times. Eighty (53%) programs were produced at Winter Park while sixty-nine (47%) originated at Holly Hill.

77. The program "Focus 2" was produced 444 times between February 1, 1967 and October 18, 1968. Approximately[14] 363 (82%) were produced at Holly Hill, and 81 (18%) were produced at Winter Park.

78. During the last license period editorials were produced at both studios. They were produced at Holly Hill

[13] "Topic" and other programs were reduced to video tape when produced, and actually broadcast at some later time. The record contains statistics showing from which studio these video tapes were sent to the transmitter. However, no findings will be formulated on such statistics. The Commission's main studio rules are designed to insure a station's continuing concentration on the affairs of its city of license. This purpose may be served by insuring that local programs are locally produced. However, once the program has been recorded, it is irrelevant where the technician who presses the button that sends the recording to the transmitter is sitting.

[14] Station records did not specify the place of production for this program. However, station employees were able to make what they considered reasonably accurate determinations as to the place of production of individual programs based upon secondary records and personal recollection.

between February 1 and December 13, 1967; between December 15 and 18, 1967; on January 3, 1968; between January 8 and February 29, 1968; and between July 1, 1969 and January 31, 1970. They were produced at Winter Park on December 14, 1967; between December 19, 1967 and January 2, 1968; on January 4 and 5, 1968; and between March 1, 1968 and June 30, 1969.

79. Between February 2, 1967 and January 24, 1970 WESH broadcast 84 local specials. Twenty-three (27%) were produced at Holly Hill, fifty (60%) were produced at Winter Park; and eleven (13%) were produced at both studios.

80. "Opinion", a five-minute segment of weekend newscasts during which citizens express their opinions on matters of interest, was broadcast 455 times between February 4, 1967 and January 31, 1970. Two hundred ninety three (64%) of these programs were produced at Holly Hill, and one hundred sixty two (36%) were produced at Winter Park.

81. Cowles maintains a Policy Manual which establishes standards calculated to insure that Daytona Beach is not neglected by the station's local programming. However, the document was not printed until June of 1970. Hence, it does not constitute evidence responsive to an issue as to the location of the main studio during the last license period.

82. The record does not indicate that there have been any complaints from local residents that the station's studio location or local programming are unresponsive to the needs of Daytona Beach. Indeed, a number of residents of the area expressed the opinion that the station's programming met the needs of Daytona Beach, Orlando and the surrounding area, and that the studios were so lo-

cated as to be convenient for the widely dispersed population the station serves.

Issue 2(e): Mail Fraud

83. Since Station WESH was purchased by the Cowles interests in 1966 its licensee has been Cowles Florida Broadcasting, Inc., a wholly owned subsidiary of Cowles Communications, Inc. (CCI). The parent company had since 1936 been in the magazine publishing business. Between 1955 and 1962 CCI had acquired five other subsidiary corporations, each in the business of obtaining magazine subscriptions. Although the business practices of these five CCI subsidiaries varied at the time of acquisition, by the 1967-9 period each had become a paid-during-service (PDS) operation.

84. The relationship between CCI and its PDS subsidiaries was very close. Many of the same individuals served as officers and/or directors of the parent and its subsidiaries; CCI guaranteed large loans made by the subsidiaries for the conduct of their business; each subsidiary was housed in buildings owned or leased by CCI; financial reports and tax returns were consolidated; and the revenues of the PDS subsidiaries were freely transferred to the parent.

85. By 1967 a pattern had been established for the operation of all of the PDS subsidiaries. One individual, who was an officer of CCI, served as president of all five subsidiaries. However, each corporation was separately staffed. Each had a chief operational officer, a director of franchise operations and personnel to carry on the business of the company.

86. Each company carried on business in basically the same way. Each contracted with "franchise dealers" who were, at least in form, independent contractors. However,

the work of the franchise dealers was overseen by a division of the PDS corporation which had the duty of insuring that the dealers lived up to their contracts and that corporate policies were carried out.

87. It was the franchise dealers and their employees who made actual contact with the public. Their job was to sell subscriptions to various magazines, hopefully several to a customer. The payment for these subscriptions was not in cash, but was made in installments over the life of the subscriptions. The compensation to the franchise dealer was basically in the form of commissions based on sales, and he in turn compensated his employees in the same fashion.

88. The magazines were sold at full subscription price, and if premiums were given the cost thereof was included in the contract. It was the stated policy of each PDS company that every customer should be aware of this, and it was the stated duty of the franchise director of each company to see that the franchise dealers were carrying out this policy.

89. However, although the PDS method of selling was successful for several years, by the mid-1960's complaints as to improper sales and collection practices began to rise. Mr. Lester Suhler, the CCI director who served as President of each of the PDS subsidiaries, attributed the rise to the entrance into the business of less experienced franchise dealers.

90. By 1968 Mr. Gardner Cowles, Chairman of CCI, became aware of the problems which were growing with the PDS subsidiaries. He discussed the matter with CCI's Executive Committee, and it was agreed that whatever was necessary would be done to halt the improper practices within the Cowles subsidiaries and their franchise

dealers. It was made clear that compliance was expected the newly enacted Central Registry Code. That code, which became effective in January, 1968, was an attempt by the PDS industry to police itself. It provided, in pertinent part, as follows:

"Subscription sales agencies will not authorize, condone, or otherwise support, any subscription solicitors and other agency representatives will not authorize, practice, engage in, or otherwise participate, in the following sales and collection practices:

"A. Statements by a subscription solicitor or a subscription sales agency or any of its other representatives, such as branch managers and franchise owners, indicating that such persons, or the agency are in any business other than the sale of periodicals and other books or publications through use of the PDS plan, or that such persons or the agency represent the publisher of a magazine periodical or any of its affiliates or divisions. (Subscription sales agencies, branch managers, franchise owners and solicitors at all times should correctly identify themselves during any and all sales presentations and collection efforts as subscription sales representatives.)

"B. Representations whose principal implication or import is to the effect that the consumer will receive 'something for nothing,' or that a periodical, book, or other item offered is 'free' (or words of similar import) when such is not a fact, and that payments are for other periodicals, books or other items in the contract, or in any way representing that the cost of the contract is to defray or pay for the postage and handling charges in sending the periodicals, books, or other items to the consumer.

"C. Stating or representing that the solicitor is conducting a 'quiz' or 'survey' when there is no intent

to award a prize for the correct answer or to use the survey information for research or other purposes, or implying that such is the fact. (However, this Code provision does not prohibit inquiries or questions of the potential customer to determine reading habits or preferences for magazine periodicals, etc., provided no prize is offered in connection with such inquiries, and no representation is made that a survey is being taken.)

"D. Stating directly or indirectly that periodicals will be delivered otherwise than by mail when such is not a fact, for example, representing that a 'route' is being made up for 'neighborhood delivery like your newspaper,' when such is not a fact.

"E. Representations concerning the average weekly cost of periodicals, unless in connection therewith it is represented that the cost is payable in accordance with a monthly payment plan to be explained by the closer and provided the consumer is advised prior to the execution of the subscription contract of the exact amount of the periodic payment, and the frequency and duration of such payment.

"F. Representing that the consumer may cancel the subscription contract unless such is the fact, and unless the cancellation provision is fully explained to the subscriber.

"G. Utilizing visually or through sales talk a personal sympathy appeal, showing illness, disease, handicap, or other personal status, past, present, or future, of the solicitor.

"H. Stating or representing that the contract term or any other matter covered in the contract is actually different from that set forth in the contract.

"I. Stating or representing in any way that the cost of periodicals purchased through use of the PDS

plan is less than the cost of purchasing the same periodicals for the same period of time from a publisher, unless such is the fact; or stating or representing in any way that the monthly cost of periodicals purchased from one subscription sales agency or solicitor is less than the monthly cost of such periodicals from other subscription sales agencies or solicitors, unless such is the fact.

"J. Securing the consumer's signature on the contract by stating or in any way representing it is:

1. 'Just a guarantee.'
2. 'Just acceptance or acknowledgement of a free subscription.'
3. Any other means which conceals the fact that the consumer is signing a contract.

"K. Using collection techniques by making representations that state or imply any of the following:

1. Wages will be summarily garnished.
2. That letters are from government or court agencies.
3. Using documents simulating legal process.
4. Threatening legal action when it is against the agency's policy.
5. Demanding improper 'late charges'.
6. Posing as credit bureaus or legitimate collection agencies."

91. However, it appears that in practice the actual supervision of the franchise dealers was and remained spotty. CCI's own subsequent investigation, an investigation conducted by the Post Office Department, and evidence received on this record all indicate that emphasis was often on encouraging sales and collection volume rather than on preventing unsavory sales and collection practices.

92. By July of 1969 CCI became aware that its PDS subsidiaries were being investigated by the Post Office Department, and their practices were being criticized on the floor of the Congress. A task force was set up to bypass the PDS management, to investigate directly the activities of the franchise dealers, and to report directly to the CCI Executive Committee. All of the franchise dealers were visited, and those found to be in repeated violation of standards were terminated. As a result by late 1969 the size of the PDS operation had been substantially reduced.

93. Several former franchise dealers testified on this record. Collectively, they present a picture of little corporate supervision of those who produced well, and extensive supervision of those whose sales or collections lagged. Each was required to sign contracts or pledges of honest practices, but each was encouraged or coerced by the PDS corporation to engage in activities which can most charitably be described as misleading.

94. For example, every form contract which was supplied to the franchise dealers by the PDS companies to be executed by the magazine subscribers stated somewhere therein words to the effect that nothing to be delivered was free. However, the same PDS companies supplied their franchise dealers with recommended sales pitches or speils which suggested or affirmatively stated that a portion of what was to be delivered was free in the sense that it was a premium for the purchase of something else. Indeed, these sales pitches were one of the primary concerns of the PDS employees charged with supervising the franchise dealers. They borrowed pitches that were proving successful for use by other dealers. If a dealer was falling behind in his sales, they suggested speils that had proven successful elsewhere.

95. Nor can it be found that such practices were engaged in by individual PDS employees unauthorized by and unknown to the corporation. The practice was for the PDS companies to check back with subscribers, both to verify the subscription and how it was sold. Under such a system the company could not have long remained unaware of any substantial pattern of impropriety in sales practices.

96. Similarly, the PDS subsidiaries supplied the franchise dealers series of form letters to facilitate collections. In a familiar pattern, each successive letter was more urgent, with the last two purporting to be from a lawyer threatening suit. In fact, the record does not indicate that the signatory of the two letters was actually an attorney, and, in fact, suit was rarely, if ever, intended.

97. From time to time PDS representatives would address conventions of their franchise dealers. One of the topics of discussion would be sales representations which some regulatory authority had found objectionable. The emphasis or instruction would not be on the elimination of the suepected misrepresentation but on finding a different way to say or imply the same thing.

98. As heretofore noted, the franchise dealers were compensated on a commission basis. However, it is apparent that the commissions to be paid on contracts requiring small payments over an extended period of time would not initially sustain an enterprise that did not have relatively substantial operating capital. This record does not indicate that the ability to supply such financing was characteristic of the typical franchise dealer. Hence, the system of loans from the PDS company to the franchise dealer was absolutely essential if the dealer was to meet

his operating expenses.[15] If the loans were not forthcoming promptly the dealer faced financial ruin through inability to meet payroll, rent, utilities and other operating expenses of the sort which cannot normally be deferred. Hence, the ability to withhold such loans gave the PDS company effective control over the franchise dealer, and that control was exercised. If a dealer refused to accept the recommendations of his PDS contractor his loans were simply withheld until he changed his mind.

99. In short, while the PDS companies made a written record of requiring their franchise dealers to pledge themselves to a pattern of exemplary conduct, their day-to-day business routine encouraged, if not required, those same franchise dealers to violate their pledges.[16] It is found that the franchise dealers were independent contractors in form only, and that their activities were dictated by and known to the PDS companies with which they had contracted.

100. By the fall of 1969 Cowles became aware that its PDS operations were under investigation in a variety of quarters including the Federal Trade Commission and

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[15] As noted at paragraph 84, *supra*, CCI guaranteed the loans by which the PDS subsidiaries obtained funds to lend the franchise dealers.

[16] The findings as to the day-to-day relationship of the PDS subsidiaries with their franchise dealers is based on the testimony of only three dealers, each of whom had some sort of a bone to pick with the PDS company with which he had contracted. Nevertheless, their testimony has been accepted as credible and representative of the overall situation which existed. Not only was the demeanor of each witness that of a man telling the truth as he knew it, but the essentials of their stories were corroborated as typical both by CCI's own investigation heretofore discussed and by the federal litigation recounted, *infra*.

the Attorneys General of several states. Of particular urgency was the discovery in December, 1969 that a Federal grand jury in Des Moines was hearing evidence as to the results of an extensive investigation by the Post Office Department.

101. Cowles requested a meeting with the officials of the Department of Justice involved in the matter, and in February, 1970 such a meeting was held in Washington, D.C. Cowles was informed that the Department of Justice intended to investigate the entire PDS industry. The investigation was starting in Des Moines where Cowles was based because Cowles controlled a large fraction of the industry.

102. In June, 1970 a further meeting was held in Washington. Cowles proposed that its PDS subsidiaries would plead *nolo contendere* to mail fraud allegations to be contained in an information.[17] However, the Department of Justice was unwilling to terminate the grand jury proceedings in the absence of a civil decree governing future conduct.

103. Cowles contends that its offer was based on the fear that the publicity surrounding a possible charge of mail fraud would have adverse business consequences. The presiding Judge finds this claim to be unconvincing. He is unable to perceive how the publicity stemming from a mail fraud indictment and subsequent trial could be more adverse than that surrounding a plea of *nolo contendere* to a mail fraud information. While the former

[17]The record is not clear as to just what charges of mail fraud Cowles was willing to plead to. The grand jury had not handed down an indictment, and Cowles presumably could not have known exactly which specific instances might be involved in any count or counts to be charged against either it or its PDS subsidiaries.

procedure is more protracted, it holds at least the possibility of ultimate acquittal, and, if Cowles believed itself and its subsidiaries to be innocent, the filing of a *nolo contendere* plea offered no such possibility.

104. The Department of Justice was willing to accept the plea of *nolo contendere* if accompanied by an appropriate civil decree because it believed it more desirable to protect the public against future abuses than to seek the maximum possible penalty for past offenses.[18] In any event, although the Department of Justice believed it had a solid case against the PDS subsidiaries, it thought its case against CCI and its personnel to be weak. In fact, it regarded the case against the CCI officer who also served as President of each of the PDS subsidiaries, as being "tenuous". In short, the prosecuting attorney regarded the arrangement which was ultimately made as most satisfactory from his standpoint. He secured penalties about as great as he could reasonably expect to obtain after a trial, and he also secured a civil decree calculated to prevent future abuses. All of this was had without the risk and expense of extended litigation.

105. Further negotiations followed as to the number of counts to be included in the mail fraud information and the terms of the civil degree. Agreement was reached, and on January 18, 1971, a criminal information was filed by the United States Attorney in the United States District Court for the Southern District of Iowa. The information contained fifty counts, ten against each PDS

[18]The thinking of the Department of Justice can be stated with confidence because the United States Attorney for the Southern District of Iowa testified on this record. His candid explanation of his actions has been most helpful in understanding what actually was involved.

subsidiary. Each defendant waived the right to have the matter submitted to the grand jury, and sought permission of the Court to enter pleas of *nolo contendere* to each count. The permission was granted and the pleas were filed. Thereupon the Court entered judgments against each defendant that "it is adjudged that the defendant upon his plea of *nolo contendere* to counts specifying the counts in the information which applied to the particular defendant has been convicted of the offense . . .", and each defendant was fined $1,000 on each of the ten counts against it.

106. The information to which the defendant corporation pleaded *nolo contendere* outlined in detail the operations heretofore described and asserted that they constituted a scheme to obtain subscriptions and collect thereon through false and fraudulent representations. It then specified fifty individuals, ten of whom had dealt with each defendant corporation and whose residence addresses were widely dispersed throughout the United States. It asserted that the United States mails were used to contact each of these individuals at some stage of what it asserted was the fraudulent sale or collection operation.

107. An attempt was made on this record to establish that the PDS corporations were actually guilty of the fifty counts of mail fraud to which they pleaded *nolo contendere*. The parties making such attempt assumed a heavier burden herein than is normal in an administrative proceeding, for "proof of guilt of crime is required to be established to the satisfaction of the fact-finder beyond a reasonable doubt", *TV 9, Inc.* v. *FCC,* F2d , United States Court of Appeals for the District of Columbia Circuit, No. 72-2049, November 6, 1973. Five of the alleged victims testified on this record as to what transpired insofar as the individual count of fraud which involved each of them was concerned. However, on July 6, 1973, after the record was closed, Cowles moved to strike their testimony. By order released July 20, 1973, the presiding Judge granted the motion and struck the testimony. The order rested on the premise that, assuming *arguendo* that the testimony of one or more of the five alleged victims established fraud, the record contained nothing to link that fraud to Cowles, its PDS subsidiaries, or anyone else. No attempt was made to show that any of the five witnesses dealt with any particular salesman, to show that the salesman who sold any of the subscriptions was employed by a franchise dealer or which one, or to show that any franchise dealer involved in the chain had a contractual or any other relationship with any PDS dealer. In short, assuming for the sake of argument that the testimony of the witnesses proved fraud, there is not a shred of evidence on this record to show who committed or profitted from that fraud.

108. Thus, there is no evidence now on this record that any of the frauds involved in the 50 counts to which the PDS corporations pleaded *nolo contendere* ever occurred, and there has never been any evidence on this record establishing that, if they occurred, the Cowles PDS corporations were involved therein. In other words, unless the uncontested fact that the corporations pleaded *nolo contendere* and the court took certain action based on those pleas establishes for the purposes of this hearing that the acts charged in the fifty counts were actually performed by the defendants, it cannot be found in this hearing that the defendant corporations actually performed the acts charged in the fifty counts.

109. In the opinion of the presiding Judge the mere fact of the entrance of the *nolo contendere* pleas and the levying of fines on the basis thereof does not establish for

the purposes of this proceeding the fact that the PDS corporations actually committed the acts alleged in the fifty counts. Undoubtedly, the filing of a *nolo contendere* plea "is an admission of guilt for the purposes of the case [in which it is entered] ", *Hudson* v. *U.S.*, 272 U.S. 451,455. Moreover, although federal precedent seems to be lacking, the well reasoned view of state courts is that, if the only fact to be established in subsequent litigation is that the defendant was convicted, it is immaterial what plea preceded the judgment of guilty, *Neibling* v. *Terry*, 177 SW 2d 502. However, the Commission is not concerned with the mere fact that the PDS corporations were convicted. Its concern is not to impose an additional penalty for the commission of crime or to otherwise punish applicants for past misdeeds. Instead, it is "the duty of the Commission to examine past misdeeds to determine the nature of the applicant's probable future performance as a licensee and the likelihood that the applicant will operate its broadcast station in the public interest", *Glenn West,* 27 RR 2d 1262.

110. Stated another way, the Commission's interest is in what happened, not in the criminal consequences of what happened. In this it is analogous to the parties in civil litigations which arise out of the same facts as led to a plea of *nolo contendere* in a criminal proceeding. With respect to such parties the federal rule is very clear: the fact of a plea of *nolo contendere* cannot be used to establish the truth of the allegations of the indictment or information to which the plea was entered, *Bell* v. *Commissioner of Internal Revenue,* 320 F2d 953; *Mickler* v. *Fahs,* 243 F2d 515. Hence, it is found that this record contains no evidence of any kind establishing that the Cowles PDS subsidiares actually committed all or any of the specific acts alleged in the information to which they pleaded *nolo contendere.*

111. However, the plea of *nolo contendere* was only one part of the agreement worked out between Cowles and the United States Attorney, and, in the eyes of the prosecutor, the less important part. On January 18, 1971, the same day that the plea of *nolo contendere* was entered, the United States Attorney for the Southern District of Iowa filed a civil Complaint against the five Cowles PDS subsidiaries and CCI itself. All of the defendants, through counsel, appeared, and on the same day the Complaint was filed, a consent decree was entered against all of the defendants by the United States District Court for the Southern District of Iowa.

112. The decree enjoined the defendants from the following conduct:

"a) Representing directly through one of its employees or indirectly after any knowledge thereof, through representations made by its franchise dealers or employees of said dealers, that any person calling upon said customer or prospective customer:

1. is conducting or participating in any survey, quiz, or contest, or is engaged in any activity other than soliciting business or misrepresenting, in any manner, the purpose of the call or solicitation;
2. represents that he is performing services for any educational, charitable, social, or other organization, or any individual or firm other than one engaged in soliciting business, unless such person in fact has an existing relationship wherein such outside educational, charitable, social or other organization benefits in the sale of the product; or misrepresenting, in any manner, the identity of the solicitor, or his firm and of the business they are engaged in;

3. will give any product or service free or as a gift or without cost or charge, or that any product or service can be obtained free or as a gift or without cost or charge, as a part of the purchase of, or agreement to purchase any magazine subscription or publication.

"b) Failing, clearly, to reveal during the initial contact with a purchaser or prospective purchaser whether by telephone, written or printed communication, or person-to-person, that the purpose of such contact is to sell magazine subscriptions or publications, products or services, as the case may be, which shall be identified with particularity at the time of such contact.

"c) Representing that any price for any magazine subscription or publication covers only the cost of mailing, handling, editing, printing, or any other element of cost, or is at or below cost; or that any price is a special or reduced price unless it constitutes a significant reduction from the subscription price regularly offered by the publisher for a subscription for the same number of years, and the specific comparison is noted; or misrepresenting, in any manner, the savings which will be accorded or made available to purchasers.

"d) Representing that any PDS contract or other purchase agreement can be canceiled at the purchaser's option, or that the right to cancel will be accorded to any purchasers, when there is no provision in such contract or agreement for cancellation on the terms and conditions represented, and unless cancellation is in fact granted on such terms and conditions.

"e) Making reference to an average cost per day, per week, or per month unless the intended purchaser is to be afforded the privilege of paying for the product or service at the rate quoted unless during the initial contact

with the purchaser the minimum payment plan to be accepted by the agency is completely described, including the actual amount of the minimum down payment required, the amount and frequency of all payments and the total costs to the purchaser, and is totally disclosed.

"f) Failing to write or print, on the face of the contract, prior to signing by the customer:

1. The name and the number of issues of publications covered by the contract; and
2. The total cost of the publications covered by the contract; and
3. The down payment required, the number of installments and the amount of each installment; and
4. The individual cost of each publication covered by the contract; and
5. The total costs of the contract; and
6. The interest or finance charges, if any.

"g) Representing that a subscription contract or other purchase agreement is a 'preference list,' 'route slip' or any kind of document other than a contract or legally binding obligation or misrepresenting, in any manner, the nature, kind or legal character of any document.

"h) Failing, clearly, to reveal in writing to each purchaser before execution, the fact that he is signing an agreement which is a legally binding obligation on the face of said contract.

"i) Attempting, by the use of telephone calls, printed matter, or any other means, to harass, by calling after 10:00 P.M., or before 8:00 A.M. (local time), or to intimidate customers in order to effect payment of any account, by representing that in the event of non-payment

or delinquency of any account or alleged debt arising from any subscription contract or other purchase agreement, the general or public credit rating or standing of any person may be adversely affected, unless defendants in good faith intend to refer the information concerning such delinquency to a bona fide credit reporting agency; or that legal action may be instituted unless defendants have a general policy of instituting legal action against alleged debtors to whom such representations are made; or misrepresenting, in any manner, the action, or results of any action which may be taken to effect payment of any such account or alleged debt. The use of documents simulating legal process demanding improper late charges or posing as credit bureaus, legitimate collection agencies or representatives of any court charged with the responsibility of serving subpoenas, summonses or legal notice, or employing letters signed by attorneys when said account has not in fact been referred to an attorney for collection.

"j) Failing to indicate on the customer's copy of a PDS contract the name, address and telephone number of the PDS agency selling the contract along with a statement to the effect that the purchaser has three days to reconsider the purchase, and if for any reason prior to the expiration of the three day period, the purchaser decides to cancel the contract it will be cancelled by the agency and no effort will be made to collect any payments and the down payment will be refunded along with a letter acknowledging cancellation, and failing to provide a separate or separable and clearly understandable form, plainly identifying the contract, giving the date the contract was signed by the subscriber and the name and address of the dealer or seller subsidiary, which the purchaser may use as a notice of cancellation.

"k) Failing to furnish to each subscriber at the time of his signing of the subscription contract a duplicate of the contract showing date signed by the customer and name of salesman together with the local dealer's address and telephone number and showing on the same side of the page, above or adjacent to the place for the customer's signature, the names of the publications being subscribed for; the number, dollar amount and frequency of installment payments; amount and rate of finance charges, if any; the charge, if any, for late payment and the conditions under which such charge shall be assessed, and the total price for each and all such publications.

"l) Failing to furnish with each coupon book initially provided to each subscriber a copy of the contract setting forth the complete final terms of the contract.

"m) Failing to include on the cover of each coupon book furnished to a subscriber:

1. A statement showing the total number of coupons in the book, the dollar amount of each coupon; and
2. A legend stating:

   'Check the number of coupons in this book and their amounts against the enclosed final version of your subscription contract.'

"n) Substituting, requesting substitution or permitting substitution, at any time during the life of the contract, of any magazine or publication for any magazine or publication originally covered by the contract except where the customer has requested substitution, or the publication has suspended publication and notification of such right to substitute has been clearly and conspicuously stated on the face of the contract in which case failing to give a customer his choice from among those magazines currently available for sale by the seller.

"o) Failing to cancel and make a pro rata refund of any unfulfilled portion of a subscription contract:

1. Whenever cancellation according to the terms of the contract has been requested.
2. Whenever any misrepresentation prohibited has been made as to that contract; and
3. Without arranging for delivery of publications already paid for, or refunding money on a pro rata basis for all undelivered issues of publications for which payment has been made in advance unless the contract provides a penalty clause for subscriber's cancellation or non payment.

"p) Furnishing or otherwise placing in the hands of others sales talks, advertising literature, printed contracts, coupon books, forms, collection materials or other similar matter by and through which the public is misled or deceived in the manner or as to things prohibited.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Cowles Communications, Inc., Home Reference Library, Inc., Home Readers Service, Inc., Mutual Readers League, Inc., Civic Reading Club, Inc., and Educational Book Club, Inc., shall enforce the terms and conditions of this injunction as to their officers, directors, employees and franchise dealers by delivering a copy of this order to each of the above-named parties not party defendants, who sell, promote or distribute PDS contracts on behalf of any or all of the defendants.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, shall inform the persons engaged in the selling of PDS contracts on behalf of the defendants, or any of them, to discontinue dealing with persons who continue to use

fraudulent sale and collection practices or deceptive acts and practices which have been enjoined by this Court.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Cowles Communications, Inc., and the defendants, Home Reference Library, Inc., Home Readers Service, Inc., Mutual Readers League, Inc., Civic Reading Club, Inc., and Educational Book Club, Inc., shall commence and/or continue a program of surveillance of its subsidiaries, franchise dealers and employees of franchise dealers as to whether or not the operations of said persons is consistent with the order of this Court, and if not so consistent, to immediately cause termination of said franchise dealer or employee violating the terms and conditions of the order of this Court."

113. As heretofore noted, Cowles' own investigations had resulted in a substantial reduction in its PDS operations prior to the initiation of the federal proceedings in Des Moines. Following the entry of the consent decree Cowles decided to get out of the PDS field altogether. By August 31, 1971, all PDS selling by the Cowles subsidiaries had been terminated. At the present time the PDS subsidiaries exist only to receive collections on previously sold subscriptions, and to service the accounts.

Issue 2(f): Cowles Character Qualifications

114. This issue is essentially conclusionary, and does require findings of fact beyond those reached on other issues.

Issue 2(g): De Facto Reallocation

115. This issue also is essentially conclusionary, and is to be decided on the basis of findings of fact reached on other issues.

Issue 3: Comparative

Cowles Florida Broadcasting, Inc.

116. As heretofore noted, Cowles Florida Broadcasting, Inc. is a wholly owned subsidiary of Cowles Communications, Inc. Its principals are:

John M. Haberlan, President, Director and General Manager of WESH-TV

Walter M. Strouse, Executive Vice President, Director and Station Manager of WESH-TV

John L. Hitchcock, Vice President, Assistant Station Manager and General Sales Manager of WESH-TV

Nicholas W. Pfeifauf, Vice President and Director of Community Affairs of WESH-TV

John Harding, Secretary of CFB and Executive Vice President and General Counsel of CCI

Marvin C. Whatmore, Treasurer of CFB and President of CCI.

117. Messrs. Haberlan, Strouse, Hitchcock and Pfeifauf are full-time executives of the station performing the day-to-day duties implicit in their job titles. They constitute the effective day-to-day management of WESH-TV. Messrs. Harding and Whatmore are not residents in the Daytona Beach area, and are not active in the routine management of WESH. CFB has no media ownership other than WESH-TV.

118. Cowles Communications, Inc. is widely held, as of January 15, 1972, there being 3,206 stockholders of record. None of its principals take part in the day-to-day management of WESH-TV.

119. CCI is connected in one way or another to an extensive range of mass media outlets. It is the licensee of KRNT-AM, FM and TV, Des Moines, Iowa. Its wholly

owned subsidiary, Cowles Tennessee Radio Properties, Inc. is the licensee of WREC-AM and FM, Memphis, Tennessee.[19]

120. CCI also owns 24.6% of the Class A common stock of the New York Times Company. Since the Class A stock as a whole is only entitled to elect 30% of the Times Board of Directors, Cowles cannot be suspected of controlling the Times and its media interests.[20] However, it must be recognized that Cowles, and its shareholders, are beneficiaries of their proportionate share of the proceeds of the activities of the Times Company. Hence, findings will be made as to the media involvement of the New York Times Company.

121. The New York Times Company publishes the New York Times daily and Sunday in New York City. It publishes six daily and four weekly newspapers in Florida. Two of the newspapers are published at communities located within the ADI of the television stations of the Orlando-Daytona Beach market: "The Ocala Star-Banner" in Marion County; and "The Leesburg Daily Commercial" in Lake County. The Times also publishes special interest

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[19] In the past CCI was engaged in the publication of newspapers and magazines. However, it no longer functions as a publisher, and its only direct involvement with printed media is the production of two special interest periodicals: "ASTA Travel News", the official publication of the American Society of Travel Agents; and "ONArrival", the in-flight magazine of Overseas National Airways, Inc.

[20] At present Gardner Cowles is one of the three Times directors elected by the Class A stockholders. Neither of the other two directors elected by the Class A shareholders or any of the six directors elected by the Class B shareholders is identified with CCI. Moreover, the record does not indicate that there is any agreement which would require future Times' boards to have even one "Cowles" director.

magazines of national circulation including "Family Circle" and various professional and sports magazines. Finally, through subsidiaries the Times owns and operates Station WREC-TV, Memphis, Tennessee, and Stations WQXR-AM and FM, New York City.

122. Certain of the owners of CCI also have substantial media involvement, Approximately 9% of CCI's stock is owned by the Des Moines Register and Tribune Company which publishes the Des Moines Sunday Register (circulation 470,000) and the Des Moines Register and Des Moines Tribune (with a combined daily circulation of 450,000). The Des Moines Register and Tribune Company also owns approximately 11% of the Minneapolis Star and Tribune Company which publishes the Minneapolis Star-Journal, a daily morning and evening and Sunday newspaper in Minneapolis, Minnesota. In addition, either directly or through majority-owned subsidiaries, the Minneapolis Star and Tribune Company is engaged in the following activities: publication of daily and Sunday newspapers in Great Falls, Montana and Rapid City, South Dakota; publication of suburban newspapers in the Denver, Colorado and Baltimore, Maryland areas; and operating Station KTVH-TV in Hutchinson, Kansas. It also owns 47% of the stock of Midwest Radio-Television, Inc., licensee of Stations WCCO-AM, FM and TV, Minneapolis, Minnesota.

123. The Des Moines Register and Tribune Company is the sole owner of Jackson Sun, Inc. which publishes the Jackson Sun, evening and Sunday in Jackson, Tennessee. Jackson Sun, Inc. owns the 100% beneficial interest in WTJS, Inc., licensee of WTJS-AM and FM, in Jackson, Tennessee. A contract for the sale of these properties has been entered into, and an application for Commission approval of the assignment is being prepared.

124. During the last license period WESH-TV presented a number of local program series. These included: "Newscope"; "Topic"; "On Camera 2"; "2-Day, 2-Night, 2-Morrow"; "Focus 11"; "Opinion"; "Editorials"; "Commentary"; "Local Specials"; and "Public Service Announcements". The various series were designed to cater to a wide variety of needs and interests.

125. "Topic" is a weekly 30-minute program. Between February 1967 and the end of 1969 the program was a vehicle for civic organizations in the Daytona Beach area. Since then it has featured WESH news personnel as panelists with the station's Director of Community Affairs as moderator. The program was broadcast a total of 141 times between February 1, 1967 and January 31, 1970. Program topics varied greatly, plainly being directed toward a wide range of interests.

126. "On Camera 2" is a 3-5 minute segment within the 5:30 p.m. news program. Usually it involves a live appearance by a currently newsworthy individual. The program was telecast 47 times between November 13, 1969 and January 30, 1970.

127. "Focus 2" was a 15-minute program carried Monday through Friday at either 9:15 a.m. or 1:15 p.m. The program which featured guests or interviews was presented 444 times between February 1, 1967 and October 18, 1968.

128. "Opinion" is a 3-5 minute segment within the weekend newscasts. It is a vehicle for the expression of opinions by newsmakers, community leaders and average citizens. The program was broadcast 455 times between February 4, 1967 and January 31, 1970.

129. "2-Day, 2-Night, 2-Morrow" is a 5-minute segment of the 12:30 p.m. news. It featured guests discuss-

ing a wide range of topics. The program was presented 148 times between February 24, 1969 and January 30, 1970.

130. "Minute Memos" are 60-second vehicles whereby civic leaders throughout the area can bring a brief message to the WESH audience. Approximately 15 seconds of the "memo" is used to introduce the speaker and his topic, and the remaining 45 seconds contains the message. In short, the "Minute Memos" resemble somewhat elaborate public service announcements. Between May, 1969 and January, 1970 "Minute Memos" were broadcast 948 times, although many of the broadcasts were repeats.

131. "Newscope" is the title WESH employes for all of its news programs. As heretofore noted some of its news programs incorporate both conventional news and segments of public service type programs. During the composite week for licenses expiring in 1970 some 34% of the station's news programs were devoted to local and regional news.

132. As part of its news programming WESH uses, in addition to normal news service weather reports, NOAA Weather Wire Service A from which it receives hourly and special weather observations from reporting stations in the Eastern United States, and Western Union Circuit from which it receives synoptic observations, regional forecasts, upper air observations, National Temperature bulletins and coded surface charts. It also microwaves pictures of the radarscope located at the Daytona Beach Regional Airport National Weather Service Office. Weathercasts are broadcast 7 days a week under the control of a staff meteorologist, and during the last composite week 34 weather telecasts were presented.

133. "Commentary" was a 3-4 minute program series presented during January, 1970. It featured a columnist for a local newspaper, but the record is not informative as to program content.

134. "TV Classroom" was presented between December, 1968 and September, 1969. It was prepared by the Continuing Educational Series of the Adult Training Division of the Daytona Beach Community College. College course credits were available to viewers through enrollment. A total of 259 telecasts were presented in the series.

135. "Opportunity Line" was produced in cooperation with the National Alliance of Businessmen, and was designed to obtain jobs for disadvantaged area residents. Between June, 1969 and January, 1970 there were 17 telecasts of the series. Initially the program was hosted by the WESH Director of Community Affairs, but after August, 1969 it featured Mr. Melvin Grace, a Daytona Beach resident employed at Station WOKB, Winter Garden, Florida. The program was normally produced at Winter Park, and apparently concentrated on opportunities available in the Orlando area.

136. During the last license period WESH produced and presented 84 "Local Specials". These programs were normally 30 minutes in length, and covered a diverse range of topics of local or regional interest.

137. WESH broadcast editorials each weekday throughout the last license period. While Mr. Gilchrist was General Manager he ordinarily prepared and presented them. After he left, the job was taken over by Mr. Pfeifauf, the station's Director of Community Affairs. Although requests to respond to the editorials have been infrequent, they have been honored when made.

138. A large number of public service announcements were broadcast during the last license period. During the year between October 1, 1968 and Sepember 30, 1969 some 6,000 PSA's were broadcast on behalf of 112 local, regional, state or national organizations. Throughout the 3-year license period over 4,000 such announcements were presented on behalf of local or state organizations.

139. A number of local residents and community leaders presented their opinions as to WESH's service to the community. The consensus of their testimony is that the station has been cooperative and sensitive to the needs of their constituencies. No contrary opinions were offered.

140. Cowles advances two other factors as meriting a comparative preference. First, are the auxiliary studios at Winter Park, Florida which have been heretofore discussed. Second, is its proposal to provide auxiliary power at its proposed new transmitter site, and to provide a back-up microwave link between its main studios and the new transmitter. However, the record does not contain the technical details of either proposal.

CENTRAL FLORIDA ENTERPRISES, INC.

141. The principals of Central, all of whom are corporate directors, are:

Name	*Office*	*Ownership Interest (%)*
E. William Crotty	President	14.25
Jeanne M. Goddard	Exec. V.P.	3.5
George P. Schanck, Jr.	Vice-President	3.5
James R. Stephen	Treasurer	14.25
Thomas W. Staed	Secretary	3.5
Louis P. Samuels		3.5
W.J. Taylor, Jr.	Vice-President	3.5
Donald P. Zima	Assistant Sect'y	1.7
Raymond A. Chambers		3.5

142. None of the Central principals or shareholders holds any interest in mass media, and none has any broadcast experience.

143. Several of Central's principals propose to take part in the day-to-day operation of their proposed station. Mr. Staed proposes "to assume full time duties as General Manager while the proposed facility is in its formative stages". He conceives the scope of the position to be "the active management of the business", although he believes that "the duties would have to be spelled out".

144. Mr. Staed has resided in Daytona Beach since 1961. He is a member of the Florida bar, although he does not now actively practice law, his principal business being the ownership and management of motels. One of his motels, which he does not propose to divest, takes up 20-30% of his time at present. He is active in a number of local organizations.

145. Mrs. Goddard proposes to "devote full time to the day-to-day operation of the station, performing corporate duties as a Vice President and Director, and as Program Director of the station". However, her precise duties are ill defined. With respect to her corporate function she testified that "in terms of duties later on, I need not be an executive. I could do whatever is asked or programmed for me". With respect to her function as Program Director she does not propose to hold that position permanently. She testified that "I was asked if I would serve in this capacity until thoroughly organized and stabilized, and I offered my services".

146. As heretofore noted, Mrs. Goddard has no experience in the field of programming or any other aspect of broadcasting. More significantly, this record indicates that neither she nor Central have made any effort to determine the workability of any particular programming

concept. Although she recognized the desirability of programming designed to meet the needs of the area, she had no knowledge whatsoever of the proposed structure of Central's program department, the proposed intra-station lines of programming authority or even the proposed programming budget. She envisions the job of Program Director as one of "extreme responsibility", but concedes that she will have to rely on knowledgeable professionals to effectuate whatever programming concepts she might eventually formulate.

147. The record does not indicate the precise place of Mrs. Goddard's residence, although it is apparent from her list of civic activities that it is in the Daytona Beach area. Within that area she had been very active in civic affairs, with an emphasis on organizations dealing with education and youth.

148. Mr. Chambers proposes to devote full time to the Central operation as Supervisor of Administration. While the record does not disclose the precise duties of that position, he would deal with personnel management, and the management of equipment.

149. Mr. Chambers is a resident of Ormond Beach, Florida, a community adjacent to Daytona Beach. His experience has been in the hotel and motel business. He has not been active in civic affairs in the Daytona Beach area.

150. Several additional principals of Central propose to devote fractions of their time to the operation of the proposed station. John C. Adams, Jr., a 3.5% stockholder, would devote 10% of his time as an advisor on public affairs programming, editorials and news. James H. Brown, a 3.5% stockholder, would devote 10% of his time assisting in the development and presentation of

public affairs and public service programming. W. Warren Cole, Jr., a 7.0% stockholder, would devote 10% of his time advising concerning certain aspects of the Central Florida proposed public affairs and news programs, with emphasis on legal affairs. Mr. Crotty proposes to devote approximately 10% of his time as General Counsel for Central. Robert C. Elston, 1.7% stockholder, would devote about 10% of his time overseeing film production facilities. George W. Engram, a 1.7% stockholder, proposes to devote about 10% of his time as an advisor on affairs of the black citizens of the area. Joseph S. Guernsey, a 3.5% stockholder, would devote about 10% of his time to the selection of topics and participants for public affairs programs. Fletcher C. Rush, a 3.5% stockholder, would devote 5-10% of his time advising as to public affairs, news and editorial programs. Louis P. Samuels would devote 15-20% of his time advising regarding proposed public affairs, editorial and news programming. George P. Schanck would devote 40% of his time advising on public affairs programs and the selection of participants. James R. Stephen would devote 50% of his time to his duties as Treasurer and to directing Central's business affairs. W.J. Taylor would devote approximately 50% of his time assisting with the preparation of public affairs and public service programming. Donald P. Zima would devote some 15% of his time to the business affairs of the station.

Conclusions

Issues 1(a) and 2(a): Areas and Populations

151. The Grade B contours of the proposed operations of both Central and Cowles are quite similar. Each would bring a new Grade B signal to slightly less than 190,000 people. However, none of the population to be gained is currently unserved. All of the people resident within Cen-

tral's gain area presently receive at least three services and most receive four. A similar situation exists within the Cowles Grade B gain area. Most of the population now receives four or more Grade B services, and virtually all receive at least three. Only 1,411 people now receive as few as two services.

152. Within the applicants' Grade B loss areas the populations are somewhat less equal. Some 23,000 persons would lose Grade B service if Central's proposal were granted, as compared to 15,639 in the event of a grant to Cowles. However, most of the people who would lose service under either proposal would continue to have a choice of at least three signals and there is little difference between the two applications with respect to the number of persons who would retain fewer than three. Within the Central Grade B loss area 666 persons would have no remaining Grade B service, as contrasted to 625 for Cowles. Central would leave 2,676 people with only one service as compared to 3,433 for Cowles. Two services would remain for 545 people under the Central proposal, as compared to 572 for Cowles.[21]

153. It is concluded that the differences between the two proposals as to areas and populations to be affected are not sufficiently great to indicate a preference for either. Hence, the technical characteristics of the proposals will not be considered in resolving the comparative issue, *infra*.

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[21] These conclusions have been based on the figures submitted by AMST rather than those of the applicants. Computation of areas and populations within a proposed contour is an art rather than an exact science, and, in the absence of evidence that any one set of computations is superior, it will be fairer to both applicants if the work of the only engineer who submitted calculations as to both proposals is used.

Issues 1(b) and 2(b): Amelioration of Signal Loss

154. Each applicant proposes to provide higher gain antennas for those homes within the loss areas whose residents believe that their reception on Channel 2 has deteriorated. It is the uncontradicted opinion of Cowles' engineer that the actual reduction of signal strength within the loss area will be too slight to be detectable on home receivers. Hence, it is reasonable to believe that more efficient receiving antennas will ameliorate any problems which may occur.

155. In addition, Cowles would seek to initiate translator service and has applied to the Commission for authority to build a translator in one community. However, as the Commission noted in the order of designation, the use of translators for coverage of areas as wide as the loss areas involved here is undesirable as an inefficient use of the spectrum. It is concluded that both applicants are reasonably likely to be able to ameliorate any loss of service, and that neither is entitled to a preference over the other on the basis of its proposal to remedy service loss.

Issues 1(c) and 2(c): Short Spacing

156. "One of the essential elements of a good cause showing for waiver of the Commission's mileage separation rule relates to the applicant's 'reasons' for its selection of a short-spaced site", *WTCN Television, Inc.*, 14 FCC 2d 870, 885. Here, both applicants are motivated by essentially the same reason: the desire to attain service contours comparable to those of the two network affiliated Orlando VHF stations with which they are in economic competition. Conceivably this could be a persuasive reason. If it were shown that an operation on Channel 2 in Daytona Beach was unlikely to be economically viable unless it stood at competitive par with the Orlando

stations, a question would be raised as to whether the public interest did not require waiver of the rules. However, no such showing has been even attempted. Hence, it must be assumed that the desire to attain competitive equality is rooted in the private economic interests of the applicants.

157. It is possible to understand, and even sympathize, with the applicants' belief that they should be permitted to stand on an even footing with the stations they regard as their competitors. However, it must be recognized that such belief stems from a misconception as to the allocations situation in the area. Rule 73.606 allocates VHF Channels 6 and 9 to Orlando, and VHF Channel 2 to Daytona Beach. The proximity of the two communities and the lack of other VHF allocations in the area has led the three national television networks to each affiliate with one of these VHF stations and to attempt to provide service to both communities from that affiliate. As a natural consequence the television industry has come to regard the three stations as serving and competing in the Orlando-Daytona Beach market. Given the circumstances, such a concept is realistic and workable from a commercial standpoint. However, the Commission has not adopted it in Rule 73.606, the allocation of television assignments made pursuant to 47 USC 307(b). Channel 2 remains assigned to Daytona Beach, not to Orlando-Daytona Beach.[22] The licensee of Channel 2, whoever it may be, takes its franchise in full cognizance of that fact. If such licensee believes that the competitive demands of the marketplace require modification of the situation its

[22] While Channel 2 has been permitted to identify itself as serving Daytona Beach-Orlando, the actual allocation scheme of Rule 73.606 has never been changed.

remedy lies in *de jure* rulemaking to change Rule 73.606, not in *de facto* change in its operation which would circumvent the strictures of the rule. It is concluded that the applicants' motives for modifying the transmitter site do not furnish good cause for waiver of the mileage separation rule. If good cause exists it must be found in the effects of the proposed move rather than its motivation.

158. It is the opinion of the presiding Judge that the results of the proposed move do not justify waiver of the rule. Undoubtedly, a new service would be brought to large numbers of people, and, as noted in the order of designation, this is a plus factor to be considered. However, there are numerous situations throughout the nation where a move in violation of the separation rules would result in a large net increase in population served. If such reason, standing alone, were enough to justify waiver the rule would cease to exist as a practical matter. More must be shown.

159. Here the additional factors include complete City Grade coverage of the community of assignment for the first time; a substantial number of persons who would receive their first NBC affiliated Grade B service; and a persuasive showing that either applicant would be able to provide equivalent protection to co-channel Station WTHS-TV in Miami, Florida.[23] None of these factors,

[23] The Cowles proposal is not designed to afford that degree of protection specified in Docket 13340. However, the Cowles proposed site is quite close to that of Central, and it is reasonable to conclude that the Cowles operation could be reengineered to provide the same degree of protection as would Central. Cowles has offered to so amend its proposal if required. Nevertheless, since it is concluded, *infra*, that the circumstances here do not warrant waiver of the rule, no consideration will be given to whether Cowles should be directed to amend its application.

standing alone or in combination, warrant waiver of the rule.

160. While complete City Grade coverage of the community of assignment is highly desirable, this record does not indicate that the failure of the existing WESH facility to provide such signal over 6% of Daytona Beach has caused any actual problems. It is desirable to bring a new network service to substantial numbers of persons. However, where, as here, virtually all of such people already ceive at least three other Grade B signals their need for an additional network service does not warrant disruption of the Commission's overall scheme of allocations. If such a factor were held to be decisive here it would become controlling in numerous other situations, and the overall pattern of allocations would be broken down. Finally, the Commission has made a determination that equivalent protection is not a substitute for the spacing requirements, but is merely a means of reducing interference when other public interest considerations indicate the desirability of short spacing, *Carolina Broadcasting Co.*, 18 FCC 2d 482. There being no showing that overriding public needs are not now being met, it is concluded that neither applicant has shown good cause for waiver of Rule 73.610(b).

Issue 1(d): Ability of Central Principals To Meet Debenture Commitments

161. Central has demonstrated the ability of each of the individuals named at paragraph 11 of the order of designation to meet their debenture commitments.

Issue 1(e): Financial Qualifications of James R. Stephen

162. Mr. Stephen has demonstrated his ability to meet his financial commitments to Central.

Issue 1(f): Availability of Bank Loan to Central

163. Central has demonstrated the availability of a bank loan in the sum of $800,000.

Issue 1(g): Availability of Studio and Transmitter Buildings

164. Central proposes that its studios and transmitter building will be constructed by a corporation owned by two of its principals, 749 Volusia, Inc. The structures would then be leased to Central. Suitable options have been obtained, cost estimates have been formulated, and 749 Volusia, Inc. has been shown to be financially capable of fulfilling the contract.

Issue 1(h): Equipment Credit

165. Central's proposed station will require $1,863,000 worth of equipment. It has arranged to obtain that equipment from RCA on terms of 25% down and the balance in 48 equal monthly installments beginning 12 months after 50% of the total value of the equipment has been shipped.

Issue 1(i): Additional Funds Available to Central

166. Central has not shown the availability of any funds other than those summarized at paragraph 58, *supra.*

Issue 1(j): Central's Total Costs

167. Central will require $1,619,532 to build its proposed station and operate it for a period of three months.

Issue 1(k): Central's Ultimate Financial Qualifications

168. Central will have available a total of $1,760,000 to meet its requirement of $1,619,532. It is concluded that Central has demonstrated itself to be financially qualified to build and operate its proposed station.

Issue 2(d): Main Studio

169. Resolution of this issue poses certain problems due to the lack of precision in the wording of the governing rule and the paucity of interpretive precedent. Three similar rules pertain to the studios of broadcast stations: Rule 73.30 for AM stations; Rule 73.210 for FM stations; and Rule 73.613 for TV stations. All three rules provide that stations will maintain their "main" studio in the place where the transmitter is located or in the principal community to be served, but none of the rules undertakes to define the attributes of a "main" studio.

170. However, Rules 73.30 and 73.210 specify that stated percentages of the stations' programming shall originate at the main studio. This program origination requirement has come to be regarded as the definition of a "main" studio for AM and FM stations. Hence, the lack of such a requirement in the TV "main studio" rule not only deprives the rule of a commonly understood definition of the term, but it implies that something else is involved in the determination of whether a given studio is the "main" studio.

171. Nor does consideration of Commission precedent in the area provide firm guidance. The parties cite no precedent, nor is the presiding Judge aware of any, wherein the Commission has stated precisely what factors applicable to all stations it considers in determining whether a given television studio is the station's "main" studio. Study of those precedents which exist teach only how the Commission treated those factors which the parties in those cases *chose* to present to it.[24] The cases do indi-

[24] It is suggested in the order of designation that if a licensee is in doubt as to what constitutes its main studio it is free to seek a declaratory ruling. While that suggestion is unquestionably true, it does not necessarily offer a solution to the problem. A declaratory ruling can only be based on the information furnished the Commission, and if the licensee does not know what factors are to be considered neither it nor the Commission can be sure that all relevant information has been supplied. Nor could the licensee inquire of the Commission just what facts it needs for a declaratory ruling, for if the scope of the information required were known it must be assumed that Rule 73.613 would be amended to provide a definition of general applicability for the term "main" studio.

[footnote continued]

cate that local program origination plays a very large part, and that other indicia do not attain material significance until such time as the amount of such programming produced at the auxiliary studio approaches 50%, *KTVE, Inc.*, 22 FCC 2d 477.

172. However, as a practical matter the resolution of the issue remains cloudy. The Commission's rules do not require television stations routinely to maintain records as to the place of production of local programs. Lacking such records it may be impossible to determine years after the event just what percentages of local programs were produced at which studios. For example, the record in this proceeding is vague and uncertain on this vital point, and no firm conclusions can be reached as to which of WESH's studios produced a majority of the station's local programming at any time during the last license period except during the month of January, 1970.

173. Moreover, none of the guiding precedents has addressed itself to the matter of what time period or periods are to be considered in determining the percentages of local programming produced at each studio. Is all the local programming produced at each studio during the entire license period to be balanced on a single scale, or are some lesser time segments to be considered? For ex-

ample, to state an extreme hypothesis, if a station produced 75% of its local programming at its main studio for the first and third years of a license period and 75% of its local programming at its auxiliary studio for the second year would the conclusion be that the main studio was unmoved because a majority of the local programming for the entire license period was produced at the main studio or that the main studio was moved during the second year? If the conclusion is that the main studio was moved during the second year, would the same conclusion be reached if the program production balance shifted to the auxiliary studio not for an entire year but for some lesser period of months, weeks or days? In this proceeding the question is of crucial importance. Plainly, a majority of WESH's local programs were produced at Winter Park during January of 1970. However, the record in no way establishes that January of 1970 was typical of the entire 36-month license period or that the performance for the entire period can be inferred from the record of a single month.

174. Nor would it be just to reach a conclusion adverse to WESH on the ground that it has failed to carry its burden of proof on the sub-issue of what the ratio of program origination was between the two studios. When the Commission's rules do not require a licensee to maintain records of a given activity, it is inherently unfair to fault the licensee for its inability to prove what those records would have shown had they been kept.

175. This is not to say that the designated issue cannot be resolved. The word "main" is one of common use to all who employ the English language. As has been judicially noted, "the word 'main' is not susceptible of a wide range of definitions . . . when used as an adjective . . . 'main' means principal, chief, first in size, rank,

importance", *Painter* v. *MacDonald,* 427 SW 2d 127. Using this commonly understood meaning of the word it is possible to evalute the evidence on this record and determine which studio Cowles has treated as its "main" studio throughout the last license period.

176. Of the various factors advanced as pertinent in determining which was the main studio not a single one favors Holly Hill. As heretofore noted the record does not contain evidence on which a firm finding could be based as to precisely what percentage of local programming originated at which studio for the entire three years of the last license period. However, for the four weeks of January, 1970 which were partially analyzed a significantly greater amount of programming was produced at Winter Park than at Holly Hill. While Cowles attempts to minimize this fact by pointing out that the balance favors Holly Hill if certain local news programming originated at Winter Park is disregarded, its argument is not persuasive. It cannot be gainsayed that the news segments in question were local programming. If Cowles, for whatever reason, chose to produce these segments at Winter Park it could not fail to have been aware of the effect of that practice on the ratio of program production between the two studios. Hence, it is concluded that for at least one month during the license period, and that the only month for which reasonably full evidence is available, CFB produced more local programming at Winter Park than at Holly Hill.

177. Indeed, the evidence as to the production of these news segments serves to point up the fact that they were produced at hours when the Winter Park studio was manned and the Holly Hill studio was not. The record contains no evidence that there were regular times when the Holly Hill studio was open while the Winter Park

studio was not. Hence, it is concluded that the hours of operation at Winter Park were longer than at Holly Hill. While the significance of this conclusion is lessened by the fact that Winter Park was the network reception point and was required to be manned whenever the station was taking a network feed, it remains a factor to be considered.

178. A substantially larger number of persons were regularly employed at Winter Park than at Holly Hill. The significance of the employment situation is lessened when it is considered that Winter Park was the network reception point and that it was the studio closest to the majority of the station's potential advertisers. These factors explain why more employees were needed at Winter Park than at Holly Hill, but they do conceal the fact that a majority of the station's business was transacted at or out of the Holly Hill studio.

179. Similarly a majority of the station's executives, including the highest ranking corporate officer in residence, maintain their offices in Orlando. The obvious reason for such an arrangement is that they have located their offices at the point most convenient to the bulk of the activities they are called upon to supervise. This situation very strongly suggests that Cowles management has itself tacitly recognized that Winter Park, not Holly Hill, is where the station's principal business is transacted. Nor can it be concluded that the office arrangement is merely attributable to middle management executives suiting their personal convenience. It could not have been lost on the individuals charged with the day-to-day operation of the station that the former General Manager was compelled to resign because of insufficient concentration on the Orlando community.

180. Finally, there is the fact that the buildings, furniture and equipment at Winter Park are markedly more valuable than those at Holly Hill. The record does not contain a breakdown of the value of individual items of property, and the discrepancy is undoubtedly attributable in part to the value of equipment necessary for Winter Park to function as the network reception point. Nevertheless, the fact remains that, by Cowles own computations, 59% of its physical assets are located at Winter Park, and only 15% at Holly Hill.

181. All of the foregoing factors, considered in conjunction, lead inescapably to the conclusion that Cowles treats its Winter Park facility as its principal place of business.

182. In assessing the significance of the foregoing conclusion certain mitigating factors must be considered. First, the record contains little evidence that the move resulted from a deliberate corporate decision to move the main studio in defiance of the Commission's rules. When Cowles acquired the station in 1966 the Winter Park facility was already of substantial importance to the conduct of the station's affairs. It was then the network reception point, and it then employed more people than Holly Hill. The record does not indicate that since then any single decisive act has tipped the balance. Rather it appears that the commercial lure of Orlando as the area's economic center has led to a series of changes, none critical in itself but collectively sufficient to result in a *de facto* move of the main studio.

183. It is also significant that the move has not resulted in a failure by WESH to provide acceptable service to Daytona Beach. The Holly Hill studios have not been neglected. CFB has materially improved them, and they constitute an entirely adequate production center.

Very substantial amounts of local programming have been produced at Holly Hill on a regular basis.[25] Daytona Beach community leaders have expressed satisfaction with the station's service to the community, and this record contains no complaints of inadequate performance. Hence, it is concluded that the unauthorized move of the main studio has not resulted in the downgrading of service to the community of assignment which Rule 73.613 is designed to prevent.

Issue 2(e): Mail Fraud

184. The evidence on this record warrants the conclusion that CCI acquired subsidiaries for the purpose of engaging in a business which it must have realized would hold temptations for the human beings doing its work to engage in mass fraud. It is further concluded that CCI's supervision to prevent such frauds was ineffectual. While no individual fraud was proven on this record, CCI satisfied itself through its own investigations that fraud was rife throughout the organization which it had created. However, its internal investigation came late in the day when it recognized that various governmental agencies

[25] At paragraph 176, *supra*, the presiding Judge has rejected Cowles argument that the local news segments in the morning network news should be ignored in determining the ratio of local programming produced at the two studios. However, it should be noted that if Cowles had seen fit to undertake what would have been a mere technical inconvenience by producing these segments at Holly Hill rather than Winter Park the ratio of local programming during the only period for which relatively complete statistics are available would have favored Holly Hill. This fact is of particular significance when it is considered that the same production team would have been working with the same news stories. Hence, it is unlikely that production of these news segments at Holly Hill rather than at Winter Park would have materially altered what went out over the air.

were about to call it to account. It is simply inconceivable that it could have theretofore been unaware of so widespread a corruption unless it chose to be unaware. The fact that it initiated a bargain for permission to plead *nolo contendere* to serious criminal charges and readily accepted the strictures of a consent decree forbidding it or its subsidiaries from engaging in practices that are *prima facie* improper speaks clearly of its awareness that it had failed to protect the public from the predatory practices of those who served it.

185. The foregoing conclusion is harsh. Had it been reached with respect to an applicant lacking a broadcast record it might well raise sufficient doubts as to how that applicant would supervise a broadcast station to require denial of the application.

186. However, that is not the case here. The Commission is concerned with the non-broadcast activities of applicants only insofar as such conduct may supply some inference as to how the applicant is likely to run a broadcast station. In this instance CFB was making a full broadcast record at the very time CCI's other subsidiaries were engaging in improper conduct. How the broadcast station was run in the past is the best indicator of how it would be run in the future, and it is unnecessary to attempt to draw inferences from the non-broadcast conduct of CCI and its non-broadcast subsidiaries. Under such circumstances no decisionally material conclusion should be based on the portion of the record devoted to this issue.

Issue 2(f): Cowles Character Qualifications

187. In view of the conclusions reached under Issue 2(e), it follows that no conclusions adverse to the character qualifications of CFB should be reached on the basis

of that issue. However, the evidence relating to the unauthorized move of the main studio is another matter. Plainly, the act of moving a main studio out of the city of assignment contrary to the Commission's rules is a matter of decisional significance.

188. However, as heretofore noted, the move does not appear to have been the product of a calculated intent to defy the Commission's authority, and the result has not been a failure to meet the station's obligation to serve the needs of Daytona Beach. Rather, it appears that the move is the end product of a series of actions, each relatively innocuous in itself, and each in response to what seemed to the station management to be a technical or commercial imperative. In considering a comparable violation of the rules, the Commission has recently held it to be a matter for forfeiture rather than disqualification, see *Public Notice* of November 21, 1973, Report No. 11950, Re *WCTV,* Thomasville, Georgia. Although forfeiture is not available here, the facts on this record do not call for more stringent action, and it is concluded that the unauthorized move of the main studio does not warrant the disqualification of CFB. The significance of the move will be further considered under the comparative issue.

Issue 2(g): De Facto Reallocation

189. It having been concluded that the Cowles application to move its transmitter site should be denied, the issue as to whether the move would constitute a *de facto* reallocation has become moot.

Issue 3: Comparative

190. The selection from among competing applicants in a comparative hearing is made on the basis of two primary objectives: maximum dispersal of control of the media of mass communications; and the best practicable

service to the public, *Policy Statement On Comparative Broadcast Hearings,* 5 RR 2d 1901. Where, as here, the choice is between an existing operator seeking renewal of license and a new applicant seeking the same facilities the diversification criteria, which is decided upon the basis of present facts rather than on inferences as to future events, can be determined in the conventional manner. However, the determination of which is most likely to bring the best practicable service to the public presents thornier problems.

191. The Commission's traditional comparative criteria are designed to choose between applicants whose operations are entirely prospective. Since neither presents an actual record of performance it is reasonable to apply the same inferential criteria to each. However, where, as here, one of the applicants has actually established a record of operating the station use of the conventional criteria in predicting how such applicant would operate in the future would be irrational. To do so would open up the possibility of concluding that, because the applicant made a strong showing on the conventional comparative criteria, that applicant would be likely to provide excellent service to the public despite evidence that past service has been unsatisfactory. And *vice versa.* Hence, the Commission undertakes to project the probable future performance of a renewal applicant solely on the basis of past performance, and does not consider those of the conventional comparative criteria which are directed to the prediction of best practicable service, *Wadeco, Inc.,* 41 FCC 2d 251.

192. However, since the new applicant has no record of past performance, its prospective operation of the facility must be projected on the basis of the conventional comparative criteria. In other words, although the ulti-

mate conclusion with respect to each applicant is the same, how it may be expected to serve the public in the future, the conclusion with respect to each applicant is based on the best available evidence suitable to its circumstances rather than on the same type of evidence with respect to each.

193. Turning first to the diversification of the mass media, it is apparent that the advantage lies with Central. It has no connection of any sort with any other mass media outlet. On the other hand Cowles' parent corporation owns an AM, FM and TV station in Des Moines, Iowa, and another of its subsidiaries owns an AM and an FM station in Memphis, Tennessee. Since CFB is a wholly owned subsidiary of CCI, the stations which are owned by CCI or its other subsidiary are all under common control, and for the purpose of this issue must be regarded as if owned by a single entity. While the significance of this conclusion is reduced because the stations involved are remote from Daytona Beach and are not shown to dominate any market, it remains a significant factor in the ultimate choice between applicants.

194. Moreover, CCI has a substantial ownership interest in the New York Times Company which has significant newspaper holdings as well as broadcast stations in Tennessee and New York. In addition, some 9% of CCI's stock is owned by the Des Moines Register and Tribune Company which has newspaper interests, and which also owns approximately 11% of the stock of the Minneapolis Star and Tribune Company which has newspaper interests in Minnesota, Montana, South Dakota, Colorado and Maryland as well as ownership of a television station in Kansas, and a minority interest in broadcast stations in Minnesota. However, these media holdings, while extensive, are of little decisional significance. CCI does not

control the New York Times Company, and the Des Moines Register and Tribune Company does not control CCI. Hence, neither corporation is able to dictate the policies of the companies in which they own stock, and no potential exists for anyone to compel the various media outlets involved to speak with a common voice. Under such circumstances, the basic policy objective underlying the Commission's diversification standards is not disserved.

195. While Central's advantage on the diversification criterion is clear, it need not be compelling unless Central's showing as to its ability to render the best practicable service equals or exceeds that of CFB. Especially is that so where, as here, a grant to Cowles would not increase the existing concentration of control of the mass media of communication. The fact that Cowles is now the licensee of WESH evinces a prior Commission determination that its media connections are not such as to make its ownership of the station contrary to the public interest. The Commission's desire to attain the maximum diversification of the control of mass media has not heretofore led it to use the diversification criterion of the standard comparative issue for the purpose of restructuring the broadcast industry. If it were to do so it is apparent that all multiple owners would stand in immediate peril with respect to the more desirable of their licenses. The effect on the stability of the industry and the consequent risk to the public interest is obvious. Hence, in a comparative hearing involving a renewal applicant the public benefit to be derived from increased diversification must be balanced against the public necessity for a stable broadcast industry. These competing objectives can best be served in comparative hearings if the opportunity to increase the existing diversification of mass

media is taken only when it can be accomplished by selecting an applicant who appears likely to render the public service at least as good as that which it has been receiving.

196. With respect to the standard of best practicable service to the public, Central's showing is not strong. The factor of full time participation in station operation by owners is of substantial importance, *Policy Statement On Comparative Broadcast Hearings,* 5 RR 2d 1901. Central proposes full time integration for only three of its shareholders who collectively own only 10.5% of its stock. While such participation is not inconsequential, it is plain that the integrated owners hold far less than the ability to control the corporate policies of the applicant.

197. Of even more importance is the temporary nature of the proposed full-time integration. Mr. Staed and Mrs. Goddard would be General Manager and Program Director, respectively, of Central's station. These are important positions and their incumbency by shareholders of the licensee is more significant than any other roles they might undertake. However, neither proposes to retain the job indefinitely. Mr. Staed would be General Manager only in the "formative stages" of the operation, and Mrs. Goddard would serve only until the station is "thoroughly organized and stabilized". Thus, Central does not propose to maintain the benefits of integrated ownership in its top positions throughout the foreseeable future, and the Commission cannot assume that it will continue throughout the license period applied for. As has been stated, "it is important that integration proposals be adhered to on a permanent basis", *Policy Statement On Comparative Broadcast Hearings, supra,* and that would not be the case here.

198. Moreover, in view of the limited tenure proposed, the lack of broadcast experience of the Central principals becomes significant. Ordinarily, lack of broadcast experience is of little weight because it is remediable, *Policy Statement On Comparative Broadcast Hearings, supra.* However, where the integration is proposed only during the formative stages of the operation, the inexperienced principals lack the time to learn the business, and their participation therein is unlikely to be truly meaningful in establishing a day-to-day pattern of operation for the station.

199. Thus, Central's full-time integration comes down to the proposal that Mr. Chambers, a 3.5% stockholder who is not a corporate officer, will serve as Supervisor of Administration. The duties of this position are undefined, and there is nothing to indicate that it will be significant in determining the nature or content of Central's program service to the community.

200. While a number of Central's shareholders have proposed varying degrees of part-time integration, primarily on a consulting basis, little weight is attached to such participation, *Policy Statement On Comparative Broadcast Hearings, supra.* This is because the Commission's experience has shown that such integration rarely has a preceptable effect on the conduct of station operations. Running a broadcast station is a complicated business in which, like any other enterprise, authority cannot be divorced from responsibility without risking chaos. Employees must know at all times just who it is that wields the decision making power, and they cannot be confused by the actions of "consultants" who happen to be minority shareholders. Hence, the part-time contributions of minor stockholders who are essentially dilettantes at the business tend, as a practical matter, to be

treated as interference with the prerogatives of the individuals charged with management responsibility, and rarely have a material effect on the overall operation of the station.

201. Considered overall, Central's integration proposal is very weak. After the enterprise is launched there would be very little full-time integration, and that in a subordinate role. It is most unlikely that the owners of the corporation would play a more than nominal role in the conduct of the station's day-to-day affairs.

202. On the other hand, CFB's record of service to the public has been thoroughly acceptable. It has evolved and presented a substantial number of programs and program series designed to serve the needs and interests of the community. A number of local residents and community leaders have expressed satisfaction with the station's performance, and, significantly, the record lacks evidence of any complaints as to how the station has been run. There is no reason to believe that future performance would be less satisfactory.

203. The only blot on the station's record is the series of actions which have resulted in a *de facto* move of the main studio from Holly Hill to Winter Park. If this had been shown to be the result of a deliberate intention to defy the Commission's rules, or to have had the effect of lowering the quality of service to Daytona Beach, it would raise serious doubts as to CFB's ability to render the best practicable service to the public. However, it has already been concluded that this has not been the case. While the unauthorized move of the main studio is grounds for a comparative demerit to CFB, it does not lead to the conclusion that CFB has been shown to be unlikely to continue to provide proper service to the community it has the duty to serve.

204. Moreover, the existence of an auxiliary studio at Winter Park materially enhances CFB's ability to serve that portion of its audience which resides in the Orlando area. Central's proposal to substitute a mobile van for a permanent auxiliary studio in the Orlando area simply does not give the promise of an ability to render comparable service. While steps must be taken to insure that CFB's Winter Park studios are returned to auxiliary status, their existence is a definite plus for CFB in determining which applicant is most likely to render the best service to the public.

205. It is concluded that, overall, CFB merits a distinct preference over Central as to the ability to render the best practicable service to the public. It is further concluded that this preference outweighs that to which Central is entitled by virtue of its ability to reduce the existing level of concentration of control of the mass media of communications. There has been no showing that the degree of concentration of media control which came about when the Commission permitted Cowles to acquire WESH has actually disserved the public interest, and in such circumstances the more compelling objective is the selection of the applicant which is most likely to provide the best practicable service to the public.

206. Both applicants having been found fully qualified to operate their proposed stations, and CFB having been preferred on the comparative issue, the public interest would be served by a grant of the CFB application.

207. However, it is apparent that CFB must so modify its operations as to reconstitute Holly Hill, or someplace else in Daytona Beach, as its main studio. The public interest would not be served by permitting the station to continue to operate in violation of the rules. While it is better that the licensee make the initial determination as

to just what is to be done to modify its operation, it is essential that steps be taken promptly, and, at a minimum that records be kept which will prove that a majority of the local programming is hereafter produced at the main studio in Daytona Beach.

Accordingly, IT IS ORDERED, That, unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Cowles Florida Broadcasting, Inc. for renewal of license IS GRANTED; the application of Cowles Florida Broadcasting, Inc. for modification of authorized facilities IS DENIED; and the application of Central Florida Enterprises, Inc. IS DENIED; and

IT IS FURTHER ORDERED, That within 60 days of the release of this Initial Decision Cowles Florida Broadcasting, Inc. WILL REPORT to the Commission as to the steps it has taken to secure compliance with Rule 73.613, and that in future renewal applications it will submit a breakdown as to where its local programming originated; and

IT IS FURTHER ORDERED, That the grant of the application of Cowles Florida Broadcasting, Inc. is without prejudice to whatever action the Commission may deem appropriate as a result of the pending proceedings involving Cowles Communications, Inc. instituted by the Federal Trade Commission, the States of Wisconsin, California and Michigan, and the Pennsylvania litigation involving Mutual Readers League, Inc., a subsidiary of Cowles Communications, Inc.

Chester F. Naumowicz, Jr.
Administrative Law Judge
Federal Communications Commission

APPENDIX F

[372] F.C.C. 76-642

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Applications of:

COWLES FLORIDA BROADCASTING, INC. (WESH-TV), DAYTONA BEACH, FLORIDA	Docket No. 19168 File No. BRCT-354
For renewal of license	
COWLES FLORIDA BROADCASTING, INC. (WESH-TV), DAYTONA BEACH, FLORIDA	Docket No. 19169 File No. BPCT-4158
For Modification of authorized facilities	
CENTRAL FLORIDA ENTERPRISES, INC., DAYTONA BEACH, FLORIDA	Docket No. 19170 File No. BPCT-4346
For a construction permit	

Appearances

Robert A. Marmet, Gordon R. Malick and *Jacob A. Stein* (Marmet Professional Corporation) on behalf of Cowles Florida Broadcasting, Inc., and Cowles Communications, Inc.; *Joseph F. Hennessey, Lee G. Lovett,* and *Eric T. Esbenson* (Pittman, Lovett, Ford and Hennessey) on behalf of Central Florida Enterprises, Inc.; *J. Peter Luedtke, Edgar F. Czarra, Jr., Donald Harrison* and *Jonathan D. Blake* (Covington and Burling) on behalf of The Association of Maximum Services Telecasters, Inc.;

Gene A. Bechtel (Arent, Fox, Kintner, Plotkin and Kahn) on behalf of witness Robert M. Goshorn; *Clyde E. Herring* on behalf of witness Lester Suhler; and *Charles W. Kelley, Kathryn S. McGovern, Thomas B. Fitzpatrick* and *Theodore Kramer* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: June 30, 1976; Released: July 20, 1976)

COMMISSIONER CHARLOTTE T. REID FOR THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; HOOKS AND ROBINSON DISSENTING AND ISSUING STATEMENTS.

Background

1. Before us are three applications: (a) a renewal application filed by Cowles Florida Broadcasting, Inc. ("Cowles") for Station WESH-TV, Channel 2, Daytona Beach, Florida (Docket No. 19168); (b) Cowles' application for modification of WESH-TV's facilities (Docket No. 19169); and (c) a competing application for a construction permit for operation on Channel 2, filed by Central Florida Enterprises, Inc. (Docket No. 19170).

2. Although Cowles objected to acceptance of Central's application, we overruled those objections. *Central Florida Enterprises, Inc.*, 22 FCC 2d 220 (1970). In pleadings filed in conjunction with its application, Central raised various questions concerning Cowles and its operation [373] of WESH-TV. Additionally, The Association of Maximum Services Telecasters (AMST) filed informal objections to the engineering proposals of both applicants. The applications were designated for hearing by an Order released March 10, 1971. 36 Fed. Reg. 4901. Paragraphs 20 and 26 of that Ord r made Cowles' stewardship of

WESH-TV subject to the "substantially attuned" test of the *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424. After the Policy Statement was invalidated in *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (1971), the Commission amended the Designation Order by purging all references to the Policy Statement (Order, August 20, 1971, 36 Fed. Reg. 16076). And in order fully to comply with the Court's mandate in the *Citizens* case, a further "Redesignation Order" was issued on February 24, 1972.

3. With respect to Central's application, the Commission specified issues to determine:

(a) areas and populations which might gain or lose service under Central's proposal, as compared to WESH-TV's present service, and other television services available to such areas;

(b) in the event a loss area existed, Central's plans to ameliorate or eliminate losses and the efficacy of such plans;

(c) whether a waiver of Section 73.610(b) of the Rules [requiring a 220-mile separation between transmitter sites for co-channel stations located in ZONE III] was justified, and if so, conditions needed to assure that equivalent protection is provided to Station WTHS-TV, Channel 2, Miami, Florida; and

(d) to (k) whether Central is financially qualified.

4. With respect to Cowles' renewal and modification applications, issues were specified to determine:

(a) areas and populations which might gain or lose television service under the modification application, and other television services available to such areas;

(b) in the event a loss area existed, Cowles' plans to ameliorate or eliminate actual losses;

(c) whether a waiver of Section 73.610(b) of the Rules is justified, and if so, conditions needed to assure equivalent protection to WTHS-TV, Miami, Florida;

(d) whether Cowles had moved its main studio without prior Commission approval;

(e) the facts and circumstances (1) surrounding the criminal proceeding relating to purported mail fraud by five wholly-owned P.D.S. [Paid-During Service] subsidiaries of Cowles' parent, Cowles Communications Inc., (2) surrounding the companion civil proceeding relating to purported nationwide fraudulent and deceptive practices by these same PDS subsidiaries, and (3) relating to the extent, if any, of participation and/or responsibility of Cowles Communications, Inc. for the activities of its 5 PDS subsidiaries;

(f) in light of the evidence adduced under issues (d) and (e), whether Cowles is qualified to be a Commission licensee, or [374] whether it should be given a comparative demerit or demerits; and

(g) whether a grant of the modification application would constitute a *de facto* reallocation of Channel 2 from Daytona Beach to Orlando.

AMST was made a party to the proceeding to aid in developing the record on the applicants' short-spacing waiver requests. (Par. 6, Designation Order.) And after the Review Board amended the Designation Order to expand inquiry into the mail fraud issue, Cowles Communications, Inc. ("CCI") was made a party to this proceding. *Cowles Florida Broadcasting, Inc.*, 32 FCC 2d 436 (1971).

5. In an Initial Decision (I.D.) released December 7, 1973, Administrative Law Judge Chester F. Naumowicz, Jr., recommended a grant of Cowles' application, and denial of Cowles' modification application and Central's competing application for a construction permit.[1] We essentially agree with the Judge's findings and conclusions, and except as modified in this Decision and in our ruling on the exceptions contained in the Appendix, the I.D. is affirmed.

6. We first consider three procedural matters. Cowles from the outset objected to acceptance of Central's competing application on the ground it was incomplete. In *Central Florida Enterprises*, 22 FCC 2d 260, we ruled that although Central had not complied fully with all the application instructions, its application was substantially complete and thus acceptable. Cowles renews its objections, contending that under *George E. Oleson*, 6 FCC 2d 502, Central's application should have been returned. Cowles also contends post-designation amendments bearing on Central's financial qualifications permitted by the Judge should be stricken for lack of good cause under Section 1.522(b) of the Rules, and Central's application remanded for further consideration on the financial issue.

7. Cowles' request for a remand is without merit. The Judge permitted the amendments because he did not believe they would delay the hearing. The Judge concluded Central was financially qualified, and apart from its pro-

[1] Central filed exceptions to the I.D., Cowles filed exceptions to portions thereof, the Bureau filed a statement in support of the I.D. and comments on the applicants' exceptions, and AMST filed a reply limited to those aspects of the exceptions involving the Judge's denial of the applicants' short-spacing waiver requests. Additionally, the applicants filed briefs in support of their exceptions, and reply briefs. Oral argument was held before the Commission on November 26, 1974.

cedural argument here, Cowles does not question the findings or conclusions on Central's financial qualifications.[2] In the circumstances, Cowles' request for a remand is academic and is denied.

8. Moreover, we do not think that subsequent developments respecting Central's financing require a remand. Originally, Central relied on an $800,000 loan from the Empire Bank of Springfield, Missouri, a sum representing slightly less than half of Central's financial needs. The Empire Bank commitment expired in December, 1974. On June 18, 1975 and October 20, 1975, Central advised the Commission it was preparing a petition for leave to amend its application to reflect an $800,000 loan from the Barnett Bank of Winter Park in substitution for [375] the expired Empire Bank loan. The amendment reflecting the Barnett Bank loan and Central's accompanying petition for leave to amend were filed December 18, 1975. Central's petition indicated, *inter alia*, that Dennis C. McNamara had acquired a 5% stock interest in Central in consideration of his efforts in obtaining the Barnett Bank loan. (Central's petition for leave to amend also attempts to raise and relitigate matters which are utterly irrelevant here, and those matters are disregarded.) As good cause for accepting the amendment, Central argues it has acted diligently; that in any event lack of diligence is not determinative of good cause; and that where circumstances beyond an applicant's control necessitate an amendment and no unfairness is involved, the public

[2]In unopposed petitions for leave to amend its application filed May 29, 1975 and June 10, 1975, Central updated lines of credit available to stockholders Guernsey, Stephen and Rush. Leave to amend is hereby granted. We also grant Central's petition for leave to amend its application, filed June 21, 1976, to reflect extensions of loans from the Barnett Bank of Winter Park.

interest is served by permitting an applicant to cure a disqualifying factor.

9. In brief comments filed December 30, 1975, the Broadcast Bureau agrees Central has shown good cause, but asks that acceptance of the amendment be deferred until Central submits affidavits from its stockholders pledging their stock to secure the new loan (as the stockholders had earlier agreed to do under the Empire Bank loan).

10. On December 21, 1975, Cowles filed its opposition to Central's petition for leave to amend, contending entirely new financial arrangements were involved and that Central has not been diligent. However, Cowles' significant argument is that because McNamara is a director of the Barnett Bank of Winter Park (and two other commonly-owned Barnett banks in the area), his acquisition of a 5% interest in Central would violate the Florida Banking Code. Consequently, McNamara would either have to forego his stock interest or pay for it.

11. Apparently in response to Cowles' opposition, on February 10, 1976, Central filed another petition for leave to amend its application. This latter petition indicates that after reviewing the provisions of the Florida Banking Code, Central rescinded its arrangements whereby McNamara would acquire a 5% stock interest; that there are no understandings to the effect McNamara will receive any equity interest in Central, and that the Barnett Bank commitment still remains in effect.

12. On February 23, 1976, Cowles filed an opposition to Central's new petition, suggesting that because McNamara was willing to obtain a loan for a consideration, rescission of such consideration may cause a failure of consideration, resulting in Central's having no real loan

commitment. Cowles also refers to alleged inconsistencies, noting the December, 1975 amendment represented McNamara already *was* then a stockholder, while the January, 1976 amendment speaks of rescinding that agreement, under which McNamara *would* have acquired his interest. In light of this, Cowles states that if the amendment is accepted, it will consider filing a petition to enlarge the issues to inquire into all the facts surrounding the new financing arrangements.

13. Also on February 23, 1976, in response to the Bureau's comments on the December amendment, counsel for Central filed a letter complying—out of abundant caution—with the suggestion made in the Bureau's comments on Central's December amendment that all of Central's stockholders should indicate they would pledge their stock with the Barnett Bank if called upon to do so by the Bank (a condition of the loan). In response, on March 1, 1976, Cowles filed comments, contending Central had not represented that the signatories of the pledge letter included all of Central's stockholders (a point on which Cowles is [376] mistaken, because Central's February 23 letter of transmittal represents it is "signed by all Central stockholders"). Cowles also speculates over whether Central's stockholders will be willing to personally endorse any loan from Barnett Bank to Central, as may additionally be required under the loan letter. All this is said to raise a question of whether the loan letters from Barnett Bank are still valid.

14. We agree with Central and the Bureau that good cause has been shown for granting Central's petitions for leave to amend and the amendments are accepted. While delay was involved in obtaining a new loan, such delay is understandable and inevitable when a newly-formed corporation such as Central seeks a loan of this size to

finance a new television operation. Apart from this, there are substantial public interest reasons which justify accepting Central's amendment. Acceptance of the amendment will avoid further delays which would result from remanding this proceeding for additional hearings on Central's financial qualifications. Notwithstanding Central's speculations to the contrary, we are satisfied that Central's new loan commitment is firm and complies with conditions specified by the Barnett Bank. Moreover, accepting the amendment will not prejudice Cowles comparatively, unless Cowles is prepared to argue it is prejudiced because it is denied the possibility of obtaining a grant by default through its opponent's disqualification, an argument we have repeatedly rejected over the years. See *WHCN, Inc.*, 26 FCC 2d 880 (Rev. Bd., 1970). See also *Brown Broadcasting Co., Inc.*, 12 FCC 2d 189 (1968), where, in a comparative context, we stated that applicants have often been permitted to eliminate potentially disqualifying factors, and where an opportunity to amend was granted *after* the Review Board had granted an application upon review of exceptions. See also *United Television Co., Inc.*, 34 RR 2d 1465 (1975). In view of the foregoing, Central's petition for leave to amend, filed December 18, 1975, and the further petition for leave to amend, filed February 10, 1976, are granted, and the amendments to the application, as amended, are accepted.

15. The second procedural matter does not require extended discussion. After release of the I.D., the Broadcast Bureau requested that any grant of Cowles' applications be conditioned on the outcome of certain criminal proceedings against Dwayne O. Andreas (a CCI director) prosecuted under the Corporate Campaign Contribution Act. In view of the judgment of acquittal (a copy of

which was filed with the Commission) entered by the U.S. District Court for the District of Minnesota on July 11, 1974, the Bureau's request for a further condition is moot and is accordingly dismissed.

16. The third procedural matter is more complicated, and involves AMST's desire to withdraw as a party. AMST participated fully in this proceeding as a party on the issue of the applicants' short-spacing waiver requests, a matter considered below. Long after the record was closed, and several months after oral argument (in which AMST also participated), we issued on April 15, 1975 a *Notice of Inquiry in Docket 20418,* 52 FCC 2d 618. It is unnecessary to discuss that *Inquiry* at length, beyond noting that it seeks comments on the technical and financial feasibility of implementing an Office of Telecommunications Policy (OTP) plan to add new VHF stations in the top 100 markets. If, as we noted in the *Notice of Inquiry,* a sufficiently compelling record [377] is developed in Docket 20418, many of the existing technical assumptions on which the present table of television assignments is based are subject to being reopened, including the prospect of short-spaced VHF drop-ins to increase the number of television stations. The technical aspects of the inquiry in Docket 20418 are of particular interest to AMST, a group which has participated over the years in various Commission proceedings involving television broadcast television standards.

17. On July 18, 1975, AMST filed a notice that it was withdrawing from this proceeding. Its notice was accompanied by a statement of reasons for such action (discussed below) and an affidavit of "no consideration" for its withdrawal.

18. Central then filed a motion for declaratory relief, asking us to declare that AMST's "unilateral" withdrawal

from this proceeding is of no force and effect. Central's motion recites the history of AMST's participation herein up to the time the *Notice of Inquiry* was issued. Central argues AMST's dilemma stems from its participation in this restricted adjudicatory proceeding and its desire to participate on an equal footing with other participants in the unrestricted policy making inquiry in Docket 20418. Central further notes that in June, 1975, AMST discussed with Central's counsel and Cowles' counsel AMST's belief that the *ex parte* rules were not a bar to AMST's participating fully in Docket 20418 while AMST was still a party to this proceeding. While Cowles had no objection to AMST's participating in the inquity, Central did object.

19. Central contends an adjudicatory proceeding must be conducted exclusively on the record, and free from external pressures. Central argues that AMST cannot unilaterally withdraw, and AMST's withdrawal compels Central to file its motion for declaratory relief. Central contends the Commission must decide whether AMST can withdraw. It argues *Midwest Radio-Television, Inc.,* 17 FCC 2d 298 (1969), and *National Broadcasting Company,* 24 RR 245 (1962), are precedents against permitting AMST to withdraw. Central does not question AMST's good faith, nor does it charge that AMST has made improper *ex parte* presentations. But pervading its motion for declaratory relief is the fear that somehow, AMST's full participation in Docket 20418 may involve presentations which affect the issues in this case. Central argues its fears cannot be alleviated by AMST's suggestion that Central be invited to attend any meetings between AMST and decision-making persons within the Commission respecting presentations AMST makes in Docket 20418.

20. All the other parties oppose the motion for declaratory relief. Cowles argues the rules neither contemplate nor forbid AMST's withdrawal. It contends that if AMST were an applicant, its failure to further prosecute its application (i.e., to participate further) would result in dismissal of its application, and the same logic applies to an informal objector who no longer wants to participate in a hearing. Cowles argues (as do also the Broadcast Bureau and AMST in their responsive pleadings) that *Midwest Radio-Television, Inc.* and *National Broadcasting Company, supra,* are inapposite because in both these cases the parties who were prevented from withdrawing had been instrumental in having applications designated for hearing, both [378] had peculiar knowledge of particular facts involved in the hearing, and both sought to withdraw before the hearing commenced. In contrast, Cowles notes AMST has submitted substantial evidence on the issues in which it is interested, which formed the basis for part of Judge Naumowicz's initial decision. Finally, Cowles contends Central's fears are only theoretical at this point, and adoption of Central's arguments would force AMST to proceed under circumstances which would put it in jeopardy of violating the *ex parte* rules.

21. The Broadcast Bureau makes substantially similar arguments. It argues AMST has completed its hearing role; thus, arguments that AMST must be ordered to remain a party are unpersuasive, and Central has cited no precedent which forces someone to remain a party *after* his obligations are discharged. The Bureau argues Central's fears concerning the *ex parte* rules are purely speculative at this point, and it is speculative to suggest AMST would comment on the merits of this case in the Docket 20418 inquiry. Finally, the Bureau refers to our Report and Order in Docket 15381, *In re Rules Governing Ex*

Parte Communications in Hearing Proceedings, 1 FCC 2d 49 (1965), respecting participation by parties to a restricted proceeding in other general proceedings.[3]

22. In a lengthy opposition, AMST first argues the Commission's rules do not require AMST to obtain approval before withdrawing as a party. In any event, it says, the hearing is over and AMST has fulfilled the role assigned to it by the Commission. AMST next argues the cases Central relies on (see para. 19, *supra*) are completely inapposite here. Finally, AMST argues Central has utterly failed to show any prejudice resulting to it by AMST's withdrawal. Here AMST first argues the *ex parte* rules were not intended to inhibit the Commission from bona fide discussion on policy matters in quasi-legislative proceedings instituted by the Commission with *any* member of the public. AMST then contrasts the short-spacing waiver requests in this case (proposed "move-ins" of an existing channel closer to Miami) to the short-spaced VHF drop-ins involved in OTP's plan. Here, the applicants request limited exceptions to existing standards, rather than a change in general policy, which will be the thrust of the *Inquiry*. AMST then recites its efforts to persuade Central's counsel that AMST's participation in

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[3] In a request filed August 18, 1975, AMST has asked permission (which we hereby grant) to respond to a suggestion in the Bureau's opposition that the Commission might wish to limit AMST's participation in Docket 20418 to preclude it from making "any reference . . . to this [Daytona Beach] proceeding or to the facts and/or circumstances involved herein." AMST says its position is wholly consistent with the Bureau, and there is thus no need for advance notice or any express limitation since there will be no discussion of the Daytona Beach proceedings in connection with Docket 20418 discussions. However, AMST states that if the Commission wishes to limit AMST along the lines proposed by the Bureau, it has no objection.

Docket 20418 would not prejudice Central, its request to Central's counsel to identify in what respects Central would be prejudiced, and Central's failure to do so. AMST then notes that because of its belief that the issues in Docket 20418 are of overriding importance, it has determined to withdraw from this proceeding unless the Commission feels that it would be desirable for it to remain as a party. AMST recognizes that by withdrawing, it waives all further rights to participate in any future proceedings before the Commission or the courts involving these applications.

[379] 23. Central has filed a reply to the oppositions of the other parties. In essence, that reply contends the other parties have missed the point of its motion for declaratory relief, and reiterates Central's earlier arguments.

24. The motion for declaratory relief will be denied. As the parties who oppose Central's motion correctly note, the rules do not prevent a party to an adjudicatory proceeding from withdrawing without first obtaining Commission approval. Of course, there may be circumstances where the Commission can require the continued participation of a party in a proceeding, such as in the *Midwest Radio-Television* and *NBC* cases, *supra,* where the parties wishing to withdraw had made charges against other licensees, were instrumental in obtaining designation, and had peculiar knowledge of the facts underlying their charges. But those cases clearly are not controlling here, since, as the opposing parties note, AMST has fully carried out the hearing role assigned to it. Accordingly, it would be pointless to force continued participation, when AMST has determined its greater interests lie elsewhere.

25. We can appreciate Central's concern, but we agree with the opposing parties that such concern is at this

point purely speculative, especially in light of AMST's scrupulous efforts to insure that Central's interests will in no way be prejudiced. As AMST recognizes, its withdrawal bars any further participation by it in any future proceedings on these applications. Moreover, to allay any fears on Central's part that AMST might comment on the merits of these proceedings in presentations it makes in Docket 20418, we think it advisable to adopt the limitations proposed by the Broadcast Bureau, to which AMST has indicated its lack of objection. That limitation is imposed by the ordering clause, *infra.* (See fn. 3, *supra).*

26. We turn now to the merits of the applications. The pleadings are extensive: Central has filed 333 exceptions (covering 150 pages), Cowles has filed 86 exceptions (dealing mainly with denial of its modification application), and both applicants have filed lengthy and repetitious responsive pleadings. Additionally, we have the pleadings filed by the Broadcast Bureau and AMST. The exceptions center about four main areas: the applicants' engineering proposals, the studio move issue, the mail fraud issue, and comparative consideration of the applicants. We consider first the engineering issues, under which the Judge concluded neither applicant was entitled to any comparative preference for its engineering proposals. We will then consider the remaining issues, which are linked together because of the obvious bearing of the studio move and mail fraud issues on comparative consideration.

The Engineering Issues

27. Certain background information is necessary to an understanding of these issues. Under the television allocation scheme, Channel 2 (the WESH-TV facility) is assigned to Daytona Beach, and Channels 6 and 9 are assigned to Orlando, approximately 50 airmiles southwest of Day-

tona Beach. In May, 1960, the Commission authorized WESH-TV to identify itself as a Daytona Beach-Orlando station, but without relieving WESH-TV of its principal obligation to serve its city of assignment. (Cowles Exhibit No. 16.) Under the Commission's Rules, [380] the minimum separation for co-channel VHF stations in Florida is 220 miles. At one time, the transmitter sites of WESH-TV and co-channel educational Station WTHS-TV (Miami, Florida) were 228 miles apart. But in September of 1959, the Commission, with the consent of WESH-TV, permitted WTHS-TV to move its transmitter to a site 215 miles from WESH-TV's site, resulting in a short-spacing of 5 miles.

28. Under its modification application, Cowles proposes to move its transmitter 12.7 miles southeastward from its present location, to a site 22 miles south of Daytona Beach and 21 miles northeast of Orlando. The new location is in the Osteen area, and would result in a total short-spacing of 14.7 miles between the WESH-TV sites, thus increasing existing short-spacing by 9.7 miles. Central's proposed transmitter site is also in the Osteen area and would be short-spaced 13.5 miles from the WTHS-TV site, an increase of 8.5 miles compared to the present WESH-TV site. Both applicants requested a waiver of the short-spacing requirements. But because we were unable to conclude the waivers were justified, hearing issues were specified to determine areas and populations which would gain or lose television service (and alternative television service available in such areas) under each proposal; the applicants' plans, and the efficacy thereof, to ameliorate any loss of service; and whether a waiver of Section 73.610(b) of the Rules was warranted and if so, conditions needed to afford equivalent protection to WTHS-TV. Further, because a question existed as to where

Cowles' main studio was located and since Cowles' modificiation application specified a site closer to Orlando than Daytona Beach, an issue was specified to determine whether a grant of Cowles' modification application would constitute a *de facto* reallocation of Channel 2 from Daytona Beach to Orlando. A similar issue was not needed against Central because it proposed a main studio in Daytona Beach.

29. On the basis of his findings, Judge Naumowicz first considered areas and populations which would gain or lose service under the applicants' proposals. Using AMST figures,[4] he concluded gains under the proposed operations of both applicants were "quite similar," each bringing a new Grade B signal to slightly less than 190,000 persons. But he concluded none of either applicant's gain area was underserved, with all the population in both gain areas receiving three Grade B services, and most of the population receiving 4 such services. Only 1,411 persons now receive as few as two services. As for losses, he concluded 23,000 persons would lose Grade B service under Central's proposal, as against 15,639 under Cowles' proposal. But most persons losting service under either proposal would continue with a choice of at least three signals, with little difference between either proposal re-

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[4]Both applicants and AMST submitted data under these issues. (Paras. 3, 5, 6 & 9, I.D.), but the Judge used AMST figures because he believed computation of areas and populations within a contour is an art rather than an exact science, and absent evidence one set of computations was superior, it would be fairer to both applicants if the work of only one engineer who submitted calculations on both proposals was used. Fn. 21, I.D. Central has not claimed in its motion for declaratory relief, *supra*, that AMST's withdrawal invalidates AMST's data. Needless to say, that withdrawal in no way affects the evidence which AMST offered in this proceeding.

specting population left with fewer than three.[5] The Judge then concluded that differences between the proposals as to areas and popula-[381]tions were not sufficient to justify a preference for either applicant, and he accordingly indicated he would not consider technical characteristics of the proposals under the comparative issue.

30. Turning next to the issues specified to determine the applicants' ability to ameliorate any signal loss, Judge Naumowicz concluded both applicants had demonstrated they were reasonably likely to ameliorate any loss of service, and neither applicant was entitled to a preference for its proposal to remedy service loss.[6]

31. The Judge then considered the applicants' request for a waiver of Section 73.610(b) of the Rules, needed in view of the short-spacing between the applicants' sites and that of co-channel Station WTHS-TV in Miami. Noting that an essential element for waiver of the short-spacing rule is the applicant's reason for selecting a short-spaced site (*WTCN Television, Inc.*, 14 FCC 2d 870, at 885), the Judge concluded both applicants were motivated by the same reason: a desire to attain service contours comparable to those of the two network-affiliated VHF stations in Orlando. Neither applicant claimed a

[5]Within the respective Grade B loss areas, the following populations would be left with the indicated number of services: No remaining service – Central (666), Cowles (625); one remaining service – Central (2,676), Cowles (3,433); and two remaining services – Central (545), Cowles (572).

[6]The Judge took note of Cowles' proposal to use translator service in one community to ameliorate any signal loss. But he also pointed out, as we did in the Designation Order, that using translators to cover loss areas as wide as those involved here involved an inefficient use of spectrum space.

waiver was needed to keep a Daytona Beach VHF station economically viable. Accordingly, the Judge viewed the applicants' desire to gain comparable contours as rooted in the applicants' private economic interests. But while the desire to stand on an equal footing with the Orlando stations was understandable, the Judge felt this desire rested on a misconception of the basic allocation scheme for the area, which allocated Channels 6 and 9 to Orlando and Channel 2 to Daytona Beach. Even though the industry might view the market as one where all three stations competed to serve both communities, the Commission had never adopted this view for purposes of channel allocations under Section 73.606 of the Rules. Channel 2 remanded assigned to Daytona Beach, the allocation scheme had not been changed by our action in permitting WESH-TV to identify as a Daytona Beach-Orlando station, and the licensee of Channel 2 took with full awareness of this fact. In the Judge's view, if competitive marketplace demands required modification of the allocation scheme, the proper remedy lay in *de jure* rulemaking to change Section 73.606, and not *de facto* changes. The Judge therefore concluded the applicants' motives for short-spacing did not constitute good cause justifying a waiver, and if good cause existed, it had to be found in the *effects* of the proposed move.

32. The Judge concluded none of the alleged desirable effects of the move justified a waiver. He conceded a new service would be brought to a large number of persons (a point we also recognized as a "definite plus" in the Designation Order). But he noted there were numerous situations where short-spacing would increase service, and if this alone sufficed, the rule would cease to exist. The Judge then noted that under the proposals, complete City Grade coverage would be afforded to the city of assignment. However, he concluded WESH-TV's present fail-

ure to provide such a signal to 6% of Daytona Beach had not caused any actual problems. As for the plus factor of bringing a new network service to a substantial number of persons, Judge Naumowicz concluded that where (as here) virtually all such persons already receive [382] at least three other Grade B signals, disruption of the overall allocation scheme was not warranted. If this factor were made decisive here, it would control numerous other situations and the basic allocation pattern would be broken down. Finally, the Judge concluded the applicants' ability to afford equivalent protection to WTHS-TV was not controlling, because the Commission has determined equivalent protection is not a substitute for short-spacing requirements, but merely a means of reducing interference when other public interest considerations dictate the desirabliity of short-spacing. The Judge then concluded since there was ". . . no showing that overriding public needs are not now being met" (Para. 160, I.D.), both waiver requests should be denied. The Judge considered the *de facto* reallocation issue specified against Cowles as essentially conclusory in nature, and then concluded that the denial of Cowles' waiver request rendered this issue moot. (Para. 189, I.D.)

33. AMST and the Broadcast Bureau support denial of the waiver requests as vital to preserving continued integrity of the basic allocation scheme. The applicants – and Cowles in particular, the bulk of whose exceptions go to denial of its modification application – contend the Judge erred.

34. We consider Central's arguments first, which are relatively brief. Central first excepts to the Judge's reliance on AMST data, rather than the applicants' figures. Central notes its consulting engineer prepared his data pursuant to the *Report & Order re Interim Policy on*

VHF Television Channel Assignments (Docket 13340), 21 RR 1695, and 21 RR 1709 (1961).[7] It argues this methodology resulted in superior accuracy because rather than relying simply on assumed uniform population distribution in areas surveyed, Central's engineer traversed the area (at least accessible areas) to observe residences, locations and orientation of outside antennas. Central contends this methodology is entitled to a comparative preference. Central also argues that because Cowles did not use Docket 13340 standards, Cowles' data under all the engineering issues is defective and should be denied for failure of proof. Central also views Cowles' modification application as nothing more than the "final step" of an unauthorized move of Channel 2 from Daytona Beach to Orlando. Referring to the substantial numbers who would gain new Grade B service under its proposal, air space considerations which restrict it in its site choice[8] and the need for a relatively large area to accommodate the station's facilities, Central contends its waiver request should be granted.

35. Cowles' argument under this issue is more elaborate. Cowles first alleges the record shows ten public benefits would flow from grant of a waiver, but the Judge responded to only 5 of these and failed to distinguish short-spacing waivers sanctioned in *WTCN Television, Inc., supra,* and *WTEV Television,* 45 FCC 163, aff'd., *Rhode Island Television Corp.* v. *FCC,* 320 F.2d 762, 25 RR 2103. Cowles cites *Versluis Radio and Television, Inc.,*

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[7] A Docket proceeding relied on elsewhere by Cowles, and hereinafter simply referred to as "Docket 13340."

[8] The Designation Order accorded Central the right to specify another site in the event it prevailed at the hearing and its waiver request was denied.

9 RR 1123, for the proposition city-grade signal coverage of the entire community of license is essential to the television licensing scheme and licensees have flexibility in [383] locating transmitters so long as proper coverage of the community of assignment is afforded. It then argues that providing full city-grade coverage and the public benefit in grouping all area tall towers at one site amply justify a waiver.[9]

36. Cowles next takes issue with the Judge's conclusions that the applicants were motivated by a desire to achieve competitive equality with the Orlando stations, contending the Judge would limit short-spacing waivers to situations where a station is in economic *extremis*. Basing its arguments variously on the Sixth Report & Order, the interim VHF "drop-ins" in Docket 13340, *WTCN Television, supra,* and other cases, Cowles argues the Commission cannot arbitrarily prevent stations licensed to smaller communities from competing for audiences in larger, adjacent cites. Cowles then says that contrary to what Judge Naumowicz implied, there is nothing reprehensible about competition, and it would be arbitrary to lock WESH-TV forever in a technically inferior competitive position. Cowles also argues that in Docket 13340, we stressed the desirability of putting all three networks on a competitive par where possible, but the Judge failed to discuss an alleged NBC "white area" south of Daytona Beach (which would be eliminated by

[9]The grouping of tall towers is one of the public benefits the Judge allegedly failed to consider. This alleged benefit is totally without record support. Bithlo (the Channel 6 and 9 site) is approximately 20 miles from Osteen. Moreover, at oral argument, counsel for Cowles conceded that the FAA regards Bithlo and Osteen as two separate sites and he withdrew his suggestion a waiver would group all area towers at a common site. (Tr. 4679-80.)

moving the WESH-TV transmitter to Osteen) in assessing public benefits.

37. Cowles further contends the Judge decided its waiver request against an improper standard. It refers to judicial decisions requiring the Commission to take a "hard look" at waiver requests and then quotes from *WAIT Radio* v. *FCC,* 418 F.2d 1153, 16 RR 2d 2107, to the effect that application of a general rule may not be in the public interest when extended to proposed new service which will not undermine the policy basis of the rule. Arguing its site-change proposal would reduce interference to WTHS-TV and noting WTHS-TV's non-objection to short spacing, Cowles contends it has overcome the negative presumption against its proposal and all it must do is carry the normal burden of proof, which it has done in the ten alleged public benefits it has listed. Cowles agrees the Judge correctly concluded a waiver hinged on good cause, but it bitterly objects to what it views as the Judge's unwarranted speculation into its motives, because, it says, motives are immaterial and the Communications Act does not require that authorizations be based on altruism. In essence, Cowles contends, the Judge ignored the real reasons for the move[10] and erroneously denied the waiver because he felt Cowles was improperly motivated in wanting to serve Orlando.

38. On January 17, 1975, almost two months after oral argument, Cowles filed petition for leave to amend

[10]The real reasons are said to be FAA denial of earlier WESH-TV tall tower proposals, the Commission's earlier grant of a short-spacing waiver to WTHS-TV, the consent of WTHS-TV to the site change here proposed, technical superiority of the Orlando VHF stations, and FAA limitations which make Osteen the only reasonable site permitting service to both cities within FAA specifications.

its modification application. Under the amendment, Cowles' proposed antenna height would be [384] increased from 1,549 feet above mean sea level (AMSL) to 2,024 feet (AMSL), an increase made possible by a FAA Determination of No Hazard (No. 74-SO-1343-OE), issued to Cowles on December 23, 1974. As good cause for accepting the amendment, Cowles alleges it obtained FAA approval for its proposed 1,549 foot tower on January 13, 1969, but had no reason to believe until early 1974 that a tower higher than this would be permitted by the FAA. But on April 9, 1974, the FAA granted a Determination of No Hazard for a 2,049 foot tower (AMSL) near Bithlo to TV Tower, Inc., and the licensee of Channel 9 has applied to construct such a tower. Cowles alleges its engineering study for the amendment shows the loss areas adverted to by Judge Naumowicz would be eliminated and there would be no loss of Grade B service uncer the amendment. This would moot the issues specified against Cowles respecting loss of television service under the modification application and efficacy of Cowles' plans to ameliorate such losses. Cowles concedes the Commission has often held it will not accept a post-Initial Decision amendment resulting in a comparative advantage. But it argues engineering differences are usually not compared unless they are significant and notes that in Par. 153 of his decision, the Judge found differences between the applicant's engineering proposals were not sufficient to indicate a preference for either. Cowles argues that because it is not seeking a comparative advantage under its amendment, increased tower height will not change this result, but will merely moot the loss issues.

39. On February 18, 1975, Cowles informed the Commission the Department of Transportation, Federal Aviation Administration, had granted discretionary review to the Bureau of Aviation, Florida Department of Transportation on the subject No Hazard Determination issued to Cowles respecting the proposed 2,024 foot tower. On February 24, 1975, Cowles informed the Commission this review had been completed and that the Department of Transportation had informed Cowles the No Hazard determination is now final.

40. All the other parties strenuously object to accepting the amendment. All cite cases respecting the principle of administrative finality and the criteria which constitute "good cause" for accepting post-designation amendments. Central argues accepting the amendment at this late stage would be an abuse of discretion and in derogation of its *Ashbacker* rights. The Broadcast Brueau contends there is no basis for Cowles' bare assertions that its new engineering showing demonstrates loss areas would be eliminated, that it would be "unconscionable" at this late stage to accept the amendment, and that the amendment might well affect the issues on Cowles' ability to afford equivalent protection to WTHS-TV and the *de facto* reallocation issue. AMST views the amendment as a "twelfth hour attempt" to shore up Cowles' case, which should not be accepted for both procedural and substantive reasons. In an engineering statement attached to its opposition, AMST contends Cowles has not shown the amended facilities would serve the loss area, and might well increase interference to WTHS-TV. Finally, AMST points out we rejected AMST's request for a UHF impact issue in our original Designation Order. But the increased antenna height would obviously increase the UHF impact here [385] (almost doubling the Grade B overlap with at least one UHF station), and would thus require us to consider UHF impact anew.

41. In an effort to remove objections raised by the other parties, Cowles filed on April 2, 1975 a supplement to its petition to amend. In this supplement, Cowles concedes some of the objections raised by other counsel may be legitimate, and the purpose of the supplement is to put these questions to rest. Central and the Broadcast Bureau filed oppositions to the supplement, contending that such a supplement is unauthorized under the rules and in any event does not meet their earlier-raised objections. Cowles filed a reply in opposition to Central's opposition. On August 8, 1975. Cowles filed another supplement to its earlier petitions for leave to amend the modification application, by which it seeks to incorporate a letter of June 4, 1975 from the Department of Transportation, Federal Aviation Administration, reflecting the fact that prior to approving a 2,049 foot tower at Bithlo, the FAA had informally taken the position that 1,549 feet AMSL should be the maximum tower height within the state of Florida. Both Central and the Broadcast Bureau filed oppositions to the tendered amendment, which contend in essence that the new amendment does not meet their earlier objections. Cowles then filed a reply to these oppositions.

42. Cowles' final engineering argument goes to the *de facto* reallocation issue. Cowles argues the Judge's conclusions that his denial of a waiver rendered the *de facto* reallocation issue moot is procedurally defective because it is based on no findings. On substantive grounds, Cowles notes it cannot ignore a major community within its service area. It argues allocations are based on local service, which is evidenced by main studio location and principal city service. If these criteria are met, a station can locate its transmitter anywhere and still provide Section 73.606 service. *Gulf Television Co.*, 20 FCC 734 and *WKST,*

Inc., 23 FCC 354. Cowles claims the only decision in which a court found that a question of *de facto* reallocation existed was *Louisiana Television Broadcasting Corp.* v. *FCC,* 347 F2d 808, 5 RR 2d 2025, a case which it contends differs radically on its facts. Cowles further contends that although both applicants propose an Osteen site, a *de facto* reallocation issue was specified only against Cowles to provide an additional vehicle for examining WESH-TV's service to Daytona Beach and not because the Osteen site presented intrinsic dangers of *de facto* reallocation.

43. We consider first Cowles' petition for leave to amend its application to reflect the proposed antenna height increase. That petition must be denied. We agree completely with Central, the Bureau, and AMST that accepting the amendment at this late stage would be wholly inappropriate. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (1970). In effect, Cowles seeks a grant without hearing of its modified proposal. Such a grant would not be in the public interest because obviously the amendment raises questions of fact and possibly new issues (e.g., the matter of UHF impact) which would have to be resolved in hearing. No matter what Cowles says, its decision to increase its proposed tower height comes long after the comparative hearing has been completed. And obviously, assuming that all loss of service would be eliminated under the new proposal, it is idle for Cowles to contend it would not obtain a comparative advantage under the amend-[386]ment. To grant such an advantage to Cowles at this late stage would be fundamentally unfair to Central.

44. Turning to the waiver requests, we find no error in either the findings or conclusions under the engineering issues. We do not think the Judge acted unreasonably

in using AMST's figures. We made AMST a party to assist in developing the record on the waiver requests. Even though there are discrepancies between the applicants' and AMST's figures, AMST's data was more complete because it went also to losses and gains within Grade A contours (which the data of neither Cowles nor Central did). We agree with the Judge that such discrepancies are not decisionally significant and stem from different methods used by Central and AMST. And beyond its misplaced claim of superiority based on Docket 13340, Central cites no precedents to the contrary.

45. Central's argument that its engineering data is to be preferred over that of Cowles and AMST because of compliance with Docket 13340 standards is without merit. The *Report and Order* in that docket (21 RR 1965) and the *Supplemental Report* (21 RR 1709) indicate the Commission was there concerned with assigning *additional* VHF channels by permitting short-spacing in ten specified markets, *not* including Orlando-Daytona Beach. Even though "short-spacing" is an element both here and in that docket, nothing we said in Docket 13340 requires that short-spacing data be calculated exclusively under Docket 13340 standards. Accordingly, Central is not entitled to a preference for its engineering data, and, of course, the fact Cowles did not use Docket 13340 standards does not make for a failure of Cowles' proof under those issues.

46. Cowles' charge that the Judge ignored five of the asserted ten public benefits in denying a waiver is without merit. All points which the Judge allegedly ignored were covered at length, either explicitly or implicitly, in his Initial Decision.[11] Cowles is not entitled to a point-

[11] The alleged "ignored" benefits with paragraph citations to the Initial Decision are as follows: (3) WESH-TV's signal would in- [footnote continued]

by-point description and explanation of its arguments on its own terms. Nor is there any merit (and Cowles cites no precedents) for Cowles' implied argument that procedural due process requires the trier of fact to explain every precedent cited to him. In any event, the different factual bases of the *WTCN* and *WTEV* decisions renders these decisions inapplicable. See Para. 42, *infra.* We note that oral argument, counsel for Cowles conceded as much apropos of the *WTCN* decision.

47. Stripped now of the claim that operation from Osteen would further FAA goals by grouping all area tall towers at the same site (Fn. 9, *supra*), Cowles' next argument is reduced to the assertion that putting a city-grade signal over all of Daytona Beach for the first time amply justifies a waiver. While conceding city-grade coverage of the community of assignment is "highly desirable," the Judge said the record did not show WESH-TV's failure to provide such a signal over 6% of Daytona Beach had caused any actual problems. Cowles argues [387] this point deserves more thorough consideration. Cowles points to rapid growth in the Daytona Beach area since WESH-TV was first licensed, which has put approximately 6% of the city's limits beyond predicted principal community signal contours. The thrust of its argument is

crease significantly in much of the Daytona Beach-Orlando area – paras. 7, 8, 9, 21, 151, 156, 158, 159 and 160. *Point 4:* Receiving antenna orientation to all Orlando-Daytona Beach market stations would markedly improve for most residents of WESH-TV's service area – para. 10. *Point 5:* Co-channel interference between WESH-TV and WTHS-TV would be reduced – paras. 13, 24 to 27, 159 and fn. thereto, and 160. *Point 9:* There would be no actual loss of service – paras. 12, 13, 154 and 155. *Point 10:* WESH-TV would be better able to serve the entire population of its service area, including its city of license – paras. 7 to 13, 20, 23 to 27, and 151 to 160.

that it is vital for a licensee to comply with the Commission's Rules, that Cowles wishes to comply with Section 73.685(a), but denial of a waiver prevents it from doing so.

48. We find this argument unpersuasive. The city-grade coverage argument was not initially advanced in Cowles' waiver request. Indeed, it appears this argument first surfaced almost 18 months after Cowles filed its modification application. In Cowles' Exhibit 9 (received in evidence, Tr. 745), Cowles' engineering consultant stated in his affidavit that it had been assumed in previous filings and testimony that WESH-TV's 74 dbu contour covered all of Daytona Beach, but present data showed only 94% coverage. The affiant then stated he did not know whether this resulted from a change in the city's boundary after original approval of the WESH-TV site, or whether the site was originally approved despite incomplete coverage. It is thus apparent this point did not originally loom large in Cowles' planning. But without minimizing the importance of providing complete city-grade coverage, the question here is whether violation of the mileage separation standards is justified where the record discloses no actual problems exist (which was for Cowles to provie if they did), the lack of complete coverage is only minimal, and the origin of such lack may well rest on a factor beyond our control – a possible change in city boundaries. We hold that as between the two competing rules, continued integrity of the mileage separation rules is entitled to the greater weight. We do not think this does any fundamental violence to Sec. 73.685(a) of the Rules, and even Cowles' counsel conceded at oral argument that providing complete city-grade coverage did not *per se* justify short-spacing.[12]

49. We turn next to Cowles' argument that it is desirable to put all area VHF stations on competitive parity. Cowles does not contend achieving competitive equality with the Orlando stations is vital to continued existence of WESH-TV. We noted in our Designation Order that Cowles made no such claim, and the Judge did the same in the I.D. Contrary to what Cowles argues, the Judge did not say competition was reprehensible, nor does the Commission bar small town licensees from competing for revenues in larger cities within a station's service area.[13] The weakness of Cowles' arguments is that it seeks through a mixture of abstract statements on competition taken from factually different cases to elevate competition to an overriding level never articulated by the Commission. We do encourage "competitive facilities *where possible.*" *Atlantic Video Corp.*, 25 FCC 2d 687, at 689, emphasis supplied. But this must be achieved consistently with the basic alloca-[388]tion scheme. As the Judge noted – a point studiously ignored by Cowles – Channels 6 and 9 are assigned to Orlando, and Channel 2 to Daytona Beach, and this assignment scheme remains intact until changed by *de jure* rulemaking proceedings. Unquestionably, the basic allocation scheme has built-in

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[12]The crucial consideration in *WTCN* justifying short-spacing was relocation of a transmitter on a common antenna farm, the desirability of which had been suggested by both the FAA and the Minnesota Department of Aeronautics. As AMST and the Bureau note, the FAA has required nothing here.

[13]Nor does this record show we have done so here. The Judge found (I.D., Para. 69) some 80% of WESH-TV's local advertising revenues are generated in the Orlando area, a finding Cowles does not dispute.

competitive disadvantages, as attested to by our efforts over the years to equalize competition between UHF and VHF stations, the authorizing of dual-city identification, and the proceedings in Docket 13340. But any licensee of Channel 2 undertakes operation – as the Judge noted – with knowledge of the basic assignment scheme. Nor do we agree with the argument a licensee can locate its transmitter site almost anywhere so long as the city of assignment is not ignored. Adoption of this sweeping argument would inevitably lead to contour creep away from small cities of assignment toward larger communities. This would lead to a breakdown of the overall allocation scheme because, as the Judge correctly noted, a waiver here would control numerous situations where short-spacing would increase service or bring a network service to large numbers.[14]

50. Cowles' final short-spacing argument is that Judge Naumowicz applied an erroneous standard (a "showing that overriding public needs are not now being met") to its waiver request. In our view, the Judge took the "hard look" at Cowles' waiver request mandated by *WAIT Radio* v. *FCC*, 418 F2d 1153, 16 RR 2d 2107 (1969), and fully considered whether asserted benefits outweighed the competing public interest in preserving the integrity of the short-spacing rule, then decided they did

[14] The contention the Judge ignored Cowles' proposed NBC white area service in his findings is hypertechnical and decisionally insignificant. (See para. 149, where the Judge concluded both proposals would bring a first NBC Grade B service to substantial numbers.) The cases relied on to support the contention that providing a missing network service justifies short-spacing are inapposite here because they differ on their facts. While court decisions recognize the desirability of affording comparable outlets to all three networks, they do not require the absolute equality Cowles seems to demand here.

not. Arguably, considering the alleged reduction of interference to WTHS-TV and non-objection by the licensee, a waiver would not in and of itself undermine the policy basis of the short-spacing rule. But that policy is not the only one at stake. The Commission's rules are often interdependent, and the Judge concluded a waiver would lead to erosion of the overall allocation scheme by inviting future waiver requests by similarly situated licensees. Improved service, FAA requirements limiting site availability, and the need for equal technical facilities may be reasons for a waiver, as Cowles argues. But they are subsidiary reasons which were considered by the Judge, and are subsumed under the real reason for the new transmitter site, namely, Cowles' desire to achieve competitive equality with the Orlando stations. The Judge's conclusion does not charge Cowles with being improperly motivated because of this reason. He merely concluded this private economic reason was not sufficient, and we agree. In our judgement, there is no substantial merit to Cowles' argument the Judge weighed its waiver request against an erroneous standard.

51. Finally, the Judge correctly ruled that denial of Cowles' waiver request rendered the *de facto* reallocation issue moot. In view of the conclusory nature of this issue, the Judge did not err in failing to make findings under this issue. Nor can we agree with Cowles that this [389] conclusion is substantively insupportable. It is true as Cowles points out that there are several markets where commercial television stations operate from locations closer to a larger community than the smaller city of license. But Cowles makes no claim (as it did in its earlier reliance on *WTCN* and the *WTEV* decisions, *supra*) that the 13 markets it lists involved short-spacing problems. Apart from this, each short-spacing waiver

request stands on its particular facts, and having already determined that Cowles has not justified a short-spacing waiver, we need not reach the question of whether a move closer toward Orlando would in effect reallocate Channel 2 to Orlando. In any event, the evidence developed under the "main studios" issue, *infra*, shows that Cowles has substantially oriented its operations to the larger Orlando market. Although Cowles argues it has no desire to abandon Daytona Beach, we believe Central and the Bureau are correct in their observations that approval of the new site would constitute the final step in reallocating Channel 2 to Orlando on a *de facto* basis. If reallocation is in order, it should be through *de jure* proceedings in which citizens of Daytona Beach and other interested parties are afforded an opportunity to express their views.[15]

The Main Studio and Mail Fraud Issues, Cowles' Character Qualifications, and Comparative Consideration

52. *The Main Studio Issue.* On the basis of Central's charges, an issue was specified to determine whether Cowles had moved its main studio to Orlando. At this point, we refer to the Judge's findings (which we adopt without change) only to the extent needed to provide a backdrop fro an understanding of the main studio issue. Other findings will be referred to hereinafter in connection with specific arguments advanced by the applicants.

[15]Cowles argues the location of WTHS-TV is the source of the short-spacing problem, and even if Channel 2 were reallocated to Orlando, any operation of Channel 2 from Osteen would require a short-spacing waiver. Assuming this argument is true, it is the kind of argument which we believe is more appropriate to a *de jure* proceeding, where all pertinent arguments can be advanced, not just the private economic reasons of Cowles.

53. Cowles' Daytona Beach studio is located just outside that city at Holly Hill. Its auxiliary studios are located just outside Orlando in Winter Park. WESH-TV serves as the NBC outlet for the Daytona Beach-Orlando market. Under technical facilities in use when Cowles acquired the station in 1966 from Telrad (and which with some modifications still exist), network programs are picked up at Southern Bell's Orlando repeater, microwaved from there to the auxiliary studios in Winter Park, and from there go by WESH-TV microwave to the WESH-TV transmitter in the Daytona Beach area. In 1960, we authorized WESH-TV to identify as a Daytona Beach-Orlando station. But, we then emphasized we were not modifying the license to change the city of assignment, nor relieving the station of its obligation to serve Daytona Beach as the principal city.

54. In his conclusions, the Judge first observed the failure of the rule defining a television main studio (Sec. 73.613) to specify that a stated percentage of a television station's programming shall originate at the main studio implied that something else is involved in defining a "main" studio. He further observed no party had cited any precedent [390] in which the Commission had stated precisely what factors applicable to all stations determine whether a given TV studio was the "main" one. The Judge conceded local program origination plays a significant role under the precedents, but this index was inconclusive because the rules do not require maintaining records as to the place of producing local programs. Here, there was record evidence respecting the production site of local programs only for the month of January, 1970, but this did not permit an inference this month was typical for the entire license period. He therefore concluded it would be unfair to fault Cowles for failing to carry its

burden of proof, because if the rules do not require keeping records, a licensee should not be faulted for failing to prove what those records would have shown.

55. Nevertheless, the Judge concluded that under the commonly accepted meaning of "main" (principal, chief, first in rank, etc.), not a single factor advanced by Cowles in defining "main studio" favored Holly Hill, the site of the Daytona Beach studios. For the single month for which record evidence was available (January, 1970), a "significantly greater amount of programming was produced at Winter Park than at Holly Hill." (I.D., para. 176.) Hours of operation were longer at Winter Park, a fact whose significance was lessened because Orlando is the network reception point. (I.D., para. 177.) Substantially more persons were regularly employed at Winter Park, the significance of which was again lessened by Orlando's network reception status. (I.D., para. 178.) A majority of the station's officers had offices at Orlando, which suggested Cowles itself tacitly recognized Winter Park is where the station's principal business is transacted. Nor, the Judge concluded, could this be attributed to middle-level employees' suiting personal conveniences and it could not have been lost on those engaged in day-to-day operations that the former General Manager (Thomas Gilchrist) had been fired because of insufficient concentration on the Orlando community. (I.D., para. 179.) Finally, 59% of the station's physical assets were allocated to Winter Park, and only 15% to Holly Hill. (I.D., para. 180.)

56. The Judge then concluded all these factors led "inescapably to the conclusion that Cowles treats its Winter Park facility as its principal place of business." (I.D., para. 181.) In assessing the significance of this, the Judge took into account mitigating factors. First, there was little evidence the main studio move involved a deliberate corporate decision to defy the Commission's Rules. The Winter Park facility was already substantially important when Cowles bought the station. While no single decisive act "tipped the balance" in favor of Winter Park, the "commercial lure of Orlando" led to a series of changes "collectively sufficient to result in a *de facto* move of the main studio." (I.D., para. 182.) The Judge next concluded it was significant WESH-TV had not failed to provide acceptable service to Daytona Beach. The Holly Hill studios were materially improved, very substantial amounts of local programs were produced at Holly Hill, and there was no record evidence of any complaints of inadequate service to Daytona Beach. The Judge accordingly concluded the *de facto* move of the main studio had not resulted in the downgrading of service to Daytona Beach which Section 73.613 of the Rules is designed to prevent (I.D., para. 183).

57. *The Mail Fraud Issue.* This issue involves essentially Cowles' parent, Cowles Communications, Inc. (CCI); certain practices of CCI's [391] PDS magazine subsidiaries;[16] and CCI's participation in and/or responsibility for the PDS practices.

58. Since the conclusions under this issue are relatively brief, it is necessary to set out the Judge's detailed findings at some length. CCI formerly published magazines, including *Look.* Between 1955 and 1962, CCI acquired 5 subsidiaries, which by the 1967-69 period had become PDS operations. The findings detail the close relationship between CCI and the PDSs. The PDSs operated through "franchise dealers" (allegedly independent

[16] PDS stands for Paid-During Service, under which magazine subscribers pay installments over the life of the subscription.

contractors) who sold to the public and were compensated on a commission basis. By the mid-1960's complaints respecting PDS sales and collection practices arose. CCI's chairman, Gardner Cowles, became aware of the problems and discussed them with CCI's Executive Committee, after which a Central Registry Code was adopted in 1968 as an industry self-policing effort. Essentially, the Code was aimed at eliminating deceptive practices and encouraging honest dealings with the public. The Judge found adherence to the code was spotty, with emphasis more on increasing sales than preventing unsavory practices. He further found that while the PDS companies made a written record of requiring franchise dealers to pledge themselves to exemplary conduct, "their day-to-day business routine encouraged, if not required, those same franchise dealers to violate their pledges." (I.D., para. 99.)[17] Three PDS dealers testified during the hearing on day-to-day relations between the PDS companies and dealers. The Judge found each had some bone to pick with its PDS contractor. Nevertheless, on the basis of demeanor and corroboration of their testimony by CCI's own investigation and Federal litigation, he found their testimony credible and representative of the overall situation. (I.D., fn. 16.) He also found franchise dealers were independent contractors in form only, and that their activities were dictated by and known to the PDS companies.

[17] Elsewhere the Judge found there was corporate supervision only of dealers who lagged in sales, that dealers were encouraged or coerced by the PDSs to engage in activities "which can most charitably be described as misleading," that the PDSs supplied "suggested spiels" which had proven successful elsewhere, and that loans from the PDSs (lifeblood to under-capitalized dealers) were withheld until a dealer accepted a PDS recommendation. (I.D., para. 93 to 99, *passim*.)

59. Despite adoption of the Code, complaints continued to mount and CCI increased its policing efforts. It set up an investigative task force, all dealers were visited, and reported violators of the Code were terminated. By late 1969, CCI learned its PDS subsidiaries were being investigated by the Federal Trade Commission and several state Attorneys General. CCI was particularly concerned on discovering a Federal grand jury in Des Moines was hearing results of a Post Office Deprtment investigation. After meeting with Justice Department officials in February, 1970, CCI was informed the Justice Department intended to investigate the entire PDS industry, with investigations to be held in Des Moines (where CCI was based) because CCI controlled a large part of the PDS industry.

60. In a June, 1970, meeting in Washington, CCI proposed to have its PDSs plead *nolo contendere* to mail fraud allegations to be contained in an information. But the Justice Department wanted additionally a civil decree to govern future conduct. According to the U.S. [392] Attorney for the Southern District of Iowa (Allen Donielson, who testified in this proceeding), while the Department felt it had a solid case against the PDSs, it felt it had no case against CCI or CCI personnel. An agreement was finally reached on January 18, 1971, when a criminal information charging 50 counts of mail fraud (10 against each PDS) was filed. The Court entered judgment and each PDS was fined $1,000 on each count of mail fraud. In connection with CCI's contention that the *nolo contendere* pleas were based on a fear of adverse business consequences, Judge Naumowicz found this claim unconvincing, noting that while a trial might have been protracted, it at least carried the possibility of ultimate acquittal.

61. Five alleged victims of PDS fraud testified in this proceeding, in an attempt to establish the PDSs were guilty of the mail fraud charges to which they pleaded *nolo contendere.* But after the record was closed, the Judge granted Cowles' motion to strike this testimony, on the ground there was nothing to link any fraud to CCI, its subsidiaries, or anyone else. Under legal doctrines governing the effect of a *nolo* plea, the Judge ruled that entry of such pleas did not establish, for the purpose of this hearing, the fact that PDSs actually committed the acts alleged in the 50 counts. In view of his ruling, the Judge found there is no evidence in this record to establish that the PDSs actually committed any or all of the specific acts alleged in the information to which they pleaded *nolo contendere.* But the Judge noted that civil relief (more important in the eyes of U.S. Attorney) had also been granted, and his findings incorporate the terms of the decree. The Judge finally found that CCI decided to get out of the PDS business after entry of the civil decree and by August 31, 1971, all PDS selling had ended.

62. In his conclusions, Judge Naumowicz stated the record evidence warranted a conclusion CCI acquired subsidiaries to engage in a business it must have realized held temptations for PDS personnel to commit mass fraud. He further concluded CCI's supervision to prevent fraud was ineffectual, and, while no individual fraud was proven on this record, CCI satisfied itself through its own investigations that ". . . fraud was rife throughout the organization" it had created. CCI's investigations came only on the eve of governmental investigations and the Judge considered it "simply inconceivable that [CCI] could have heretofore been unaware of so widespread a corruption unless it chose to be unaware." He characterized this conclusion as "harsh" and stated had it been reached with respect to an applicant without a broadcast record, it might well be disqualifying.

63. However, the Judge noted the Commission was concerned with an applicant's non-broadcast activities only insofar as they supply some inference as to how an applicant is likely to run a broadcast station. Here, Cowles was making a full broadcast record at the very time the PDSs were engaging in improper conduct. The Judge stated how a station was run in the past is the best indicator for the future and it was unnecessary to draw inferences from the non-broadcast conduct of CCI and the PDSs. He then concluded "no decisionally material conclusion should be based on the portion of the record devoted to this issue." (I.D., para. 186.)

64. *Cowles' Character Qualifications.* We specified an issue against Cowles to determine, in light of evidence adduced under the main [393] studio and mail fraud issues, whether Cowles should be assessed a comparative demerit or demerits. In view of his conclusion on the mail fraud, the Judge ruled no conclusions adverse to Cowles' character should be based on that issue. But he considered the main studio matter to be plainly of decisional significance. Citing his earlier conclusions (Para. 49, *supra*), he concluded the studio move was not "the product of a calculated intent to defy the Commission's authority," but rather the end product of a series of actions, each innocuous in itself and each in response to what Cowles considered a technical or commercial imperative. He noted that in a comparable situation, we had considered a forfeiture more appropriate than disqualification.[18] While forfeiture was not available here, the

[18] Citing *Public Notice, Report No. 11950,* November 21, 1973, In re *WCTV,* Thomasville, Georgia.

Judge concluded the record did not call for more stringent action and concluded the studio move did not warrant disqualification of Cowles. He then deferred final consideration of the significance of the studio move to consideration under the comparative issue.

65. *Comparative Consideration.* Citing the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, the Judge observed that selection in a comparative hearing is based on two primary objectives: maximum dispersal of mass media control, and the best practicable service to the public.

66. The Judge first concluded it was "apparent that the advantage lies with Central" under the diversification factor. Central has no broadcast or mass-media interests. Cowles' parent, CCI, owns an AM-FM-TV combination in Des Moines, Iowa, and another CCI subsidiary owns AM-FM stations in Memphis, Tennessee. While these interests were remote from Daytona Beach, they remained a significant factor in the ultimate choice. The Judge further noted CCI owns a substantial stock interest in the New York Times Company,[19] which publishes the *New York Times,* other newspapers and periodicals, and which owns broadcast interests. Further, certain CCI stockholders have substantial mass-media involvement. The Des Moines Register and Tribune Company owns 9% of CCI's stock and has an 11% stock interest in the Minneapolis Star & Tribune Company.[20] But the Judge con-

[19] A 24.6% stock ownership in the Times Company's Class A common stock, which is not controlling interest. Para. 120, I.D.

[20] The Des Moines Register and Tribune Company publishes daily newspapers in Des Moines and elsewhere. (I.D., paras. 120 and 123.) The Minneapolis Star & Tribune Company publishes daily newspapers in Minneapolis and elsewhere, operates a TV sta-

[footnote continued]

cluded these related mass-media interests were of little decisional significance because CCI does not control the New York Times Company, nor does the Des Moines Register and Tribune Company control CCI. Thus, no potential existed for compelling the media involved to speak with a common voice, which meant the basic policy underlying the diversification standard was "not disserved."

67. The Judge then concluded Central's "clear" advantage on diversification need not be controlling unless Central's ability to render the [394] best practicable service equalled or exceeded that of Cowles. And this was especially so in the present context where a grant would not increase existing media concentration. He viewed Cowles' present status as the WESH-TV licensee as evincing a prior Commission determination that Cowles' media connections were not contrary to the public interest. He further noted the Commission's desire to achieve maximum diversification had not in the past led it to use the diversification criterion under the standard comparative issue to restructure the industry. In the Judge's view, in a comparative hearing involving a renewal applicant, benefits from increased diversification had to be balanced

tion in Hutchinson, Kansas, and has a 47% stock interest in an AM-FM-TV combination in Minneapolis. (I.D., para. 122.) ON April 16, 1975, Cowles filed a motion to correct the transcript respecting testimony by Gardner Cowles on who votes certain stock interests in CCI, including the Register and Tribune stock interest therein. The testimony occurred at a hearing session in 1972. That motion is denied. The motion to correct the transcript of the hearing should have been addressed to the Judge, at a time long since past. We see no reason for permitting Gardner Cowles to change his testimony now, especially in view of Central's charges that the requested change is designed to advantage CCI in collateral proceedings. As Central further notes, if Cowles wishes to correct the testimony on this point, its proper remedy is to ask that the record be reopened for this purpose, which it has not done.

against the public necessity for a stable broadcast industry. Accordingly, the Judge concluded that in a comparative hearing, an opportunity to increase diversification should be taken only if a competing applicant appears likely to render service at least as good as that which the public has been receiving. (I.D., para. 195.)

68. Turning to the best practicable service criterion, the Judge concluded Central's showing was "not strong." He noted full time participation by station owners in operations is of substantial importance under the *Comparative Hearing Policy Statement, supra.* But here, full time participation was proposed by only 3 of Central's shareholders, collectively owning 10.5% of Central's stock. While such participation was "not inconsequential," the integrated owners did not have the ability to control corporate policy. Further, the proposed integration was temporary. The important positions ("more significant than any other roles [the stockholders] might undertake") of General Manager and Program Director would be held by Mr. Staed and Mrs. Goddard, respectively. But Staed would serve only in Central's "formative stages," and Mrs. Goddard only until the station is "thoroughly organized and stabilized." Given this, the Judge concluded the Commission could not assume integration benefits would continue for the coming license period, whereas the *Policy Statement* considers it important that integration proposals be adhered to on a permanent basis. Moreover, the Judge believed Central's lack of broadcast experience – ordinarily unimportant under the *Policy Statement* because this lack can be cured – took on increased significance because participation by Central's inexperienced principals was unlikely to be meaningful. In sum, the Judge noted, full time integration of management and ownership would be limited to Chambers, a 3.5% stockholder (but not an officer), proposed Supervisor of Administration. But his duties were undefined and nothing indicated the position was significant in determining the nature or content of program service. (Paras. 196 to 199, I.D.)

69. The Judge conceded several of Central shareholders would participate in management on a part-time basis, primarily as consultants, but that little weight attached to such participation under the *Policy Statement.* In his view, part-time contributions by those who are "essentially dilettantes" rarely has a material effect on overall station operations. Viewing Central's overall integration proposals as "very weak," the Judge concluded Central's owners would probably not play more than a nominal role in station affairs. (I.D., paras. 200-201.)

70. Comparing Cowles under the best practicable service criterion, the Judge noted Cowles' record of service "has been thoroughly acceptable," with substantial programming service to meet community needs and interests. Several local residents and community leaders had expressed satisfaction with the service, and there was no record evi-[395]dence of any complaints as to how the station had been run, and no reason to believe future performance would be less than satisfactory. The only blot the Judge found on WESH-TV's record was the *de facto* move of the studio. Had that move been in intentional defiance of our Rules or had it lowered service to Daytona Beach, this would raise serious doubts respecting Cowles' ability to provide the best practicable service. But while the studio move was grounds for a comparative demerit, it did not support a conclusion Cowles was unlikely to continue to provide proper service to Daytona Beach. The Judge further viewed Cowles' Winter Park auxiliary studios as superior in ability to serve the WESH-TV audience residing in the Orlando area

as compared to the mobile van proposed by Central for meeting Orlando-area needs. The Winter Park studios were accordingly a "definite plus" for Cowles under the best practicable service criterion.

71. Making his decisive comparison, the Judge concluded Cowles merited a "distinct preference" under the best practicable service criterion. And this preference outweighed Central's preference for the ability to reduce existing levels of concentration of mass media control. In the Judge's view, there had been no showing the present concentration which came about when we permitted Cowles to acquire WESH-TV had actually disserved the public interest, and in such circumstances, the "more compelling objective" was in selecting the applicant most likely to provide the best practicable service. He accordingly concluded the public interest would be served by granting Cowles' renewal application.[21]

72. However, the Judge concluded it would not be in the public interest to permit the station to continue to operate in violation of the Rules. He therefore required Cowles to modify its operations so as to reconstitute Holly Hill, or some other place in Daytona Beach, as its main studio. At a minimum, records had to be kept to prove a majority of local programming is hereafter pro-

[21] Pursuant to the Designation Order, the grant to Cowles was conditioned on the outcome of certain then-pending litigation involving CCI and its PDSs, instituted by the Federal Trade Commission, the States of Wisconsin, California and Michigan, and certain Pennsylvania litigation involving a CCI subsidiary. By a letter of October 1, 1974, Cowles advised the Commission that all of the litigation referred to in the condition has now been terminated. All parties were furnished a copy of this report, and none has objected to Cowles' request that the condition be deleted. We agree there is no further need for this condition, and it is accordingly hereby deleted.

duced at the main studio in Daytona Beach. He further required Cowles to report within 60 days of release of the Initial Decision as to steps taken to comply with the main studio rule. Finally, he required that in future renewal applications, Cowles must submit a breakdown as to where its local programming originated.

73. We have set out the conclusions under the non-engineering issues in considerable detail because it is apparent from the pleadings the essential dispute is not so much over the basic findings as it is over the inferences therefrom. We consider now the applicants' arguments under these issues.

The Main Studio Issue

74. Central makes several arguments under the main studio issue. It first argues the unauthorized studio move shows Cowles is unfit to be a licensee and the Judge erred in not disqualifying Cowles. Taking note of the Judge's requirement that Cowles reconstitute its main studios in [396] the Daytona Beach area, Central argues the *WLBT* case is analogous and quotes language therefrom admonishing the Commission for posting "the Wolf to guard the Sheep in the hope the Wolf would mend his ways." According to Central, this is a situation where the Wolf had neither promised nor demonstrated any capacity or willingness to change his ways, but rather *"had stoutly denied . . . [any] misconduct." United Church of Christ* v. *FCC,* 359 F2d 994, 7 RR 2001, at 2017, (Central's emphasis). The significance which Central attaches to the emphasized language becomes more clear herinafter.

75. Central next disputes the conclusion that there is no firm Commission precedent as to what constitutes a

"main" television studio.[22] Central contends Cowles failed to advance in its favor a single main-studio criterion enunciated in *Gulf Television.* Central also takes issue with the conclusion that there is no firm basis for determining which studio produced a majority of local programming during the last license period, except for the month of January, 1970. A number of Central's exceptions go to this point, and all are related to the Judge's exclusion of exhibits wherein Central analyzed for certain periods the station logs of WESH-TV and STL logs required for the Studio Transmitter Link (STL) between Holly Hill and the transmitter site. The STL logs indicated that on certain dates the Daytona Beach STL was not energized, sometimes for a whole day. Central contended such log entries were entitled to some weight in determining how much local programming was produced at the Daytona Beach facilities. The Judge noted other record evidence showed it was unnecessary to energize the Daytona Beach STL to broadcast programs which had been produced in Holly Hill, and he rejected the exhibits as immaterial and without probative value. Central argues this exclusion was error because the exhibits show conclusively the Winter Park studios were in fact the "main" studio. Central further notes the one month (January, 1970) for which data permitted a determination percentage-wise as to the source of local program production involved programming developed after Central had leveled its allegations against WESH-TV's operations.

[22] In support of its argument, Central cites *Gulf Television Company,* 20 FCC 734, which we referred to in our Designation Order, as well as *Texas Key Broadcasters, Inc.,* 27 FCC 2d 269, *Ponce Television Corp.,* 18 FCC 2d 543, and *Nationwide Communications, Inc.,* 18 FCC 2d 171 and 19 FCC 2d 861. Cowles has cited the same cases in support of its argument that the studio move is not disqualifying.

76. Central next takes issue with each of the factors which the Judge concluded mitigated the impact of the studio move. It notes that since Cowles acquired WESH-TV, total employees have increased at Winter Park and decreased at Holly Hill. It argues that since 1964, heavy-duty microwave facilities have been available at Daytona Beach, thus making it unnecessary for Orlando to be treated as the network reception point. Central denies Cowles "materially improved" the Holly Hill facilities and contends that those studios constitute an entirely inadequate production center. Central notes the Winter Park studios were converted to full color capability first, and argues superior color video tape equipment is available only at the Winter Park studios. Central also disputes the conclusion that the community leaders from Daytona Beach were satisfied with the station's service to the community, contending this conclusion rests on the testimony of seven persons selected by Cowles. In light of all this, Central argues, there is [397] insufficient evidence to support a conclusion that moving the main studio has not downgraded service to Daytona Beach.

77. Finally, Central takes issue with the conclusion the studio move was not the result of a deliberate corporate decision. The relevant exceptions here involve testimony by Thomas Gilchrist, the WESH-TV General Manager who was fired by then-President Charles Brakefield because of alleged insufficient involvement in Orlando community activities. Gilchrist testified that "Brakefield said that he would close down the Daytona Beach studio if he thought he could get away with it, but he knew that he couldn't; he just wanted to keep it to satisfy the day-to-day requirement; he wanted to concentrate entirely on Orlando." (Tr. 1433.) Then, in a summarizing argument, Central contends that in light of

all the circumstances "and expecially in light of the repeated "stout denials' of [Cowles] that it had moved its main studio," Cowles' renewal application should be denied.

78. Cowles views the Judge's conclusions under this issue in a quite different light, contending the Judge erred in concluding there had been a *de facto* move of the main studio. Cowles argues it cannot ignore major population centers in its service area, and the television "main studio" rule has no discernible limits as to permissible or impermissible conduct. Cowles lists nine types of conduct when licensees can engage in without running afoul of the main studio rule. Cowles asserts no licensee (including the licensee in *Gulf Television, supra)* has been adjudged guilty of violating Sec. 73.613(a) of the Rules. Cowles argues the only mandatory main studio guideline is that a station must originate more than 50% of local programming from the main studio, and the Broadcast Bureau did not prove the Cowles had failed to comply with this requirement.

79. Cowles states the Winter Park and Holly Hill studios operated essentially as at present when Cowles acquired WESH-TV from Telrad, and this operation was disclosed in the 1966 renewal application. Cowles disputes Central's arguments that the Holly Hill studio facilities are inadequate, and quarrels with the Judge's conclusion that the evidence inescapably demonstrates Cowles treats Winter Park as its principal place of business. Noting that Orlando is the area's political and economic center, Cowles argues that for years, the main studio rule has been explained in terms of local program service, and Cowles' pursuit of revenues in the Orlando area does not change this result. In sum Cowles says there is no competent record evidence to support the conclusion WESH-

TV failed to meet its main studio programming requirement.[23]

80. The Bureau fully supports the Judge's conclusions under this issue. It agrees that Cowles over a period of time relocated the main studio, and it agrees no firm conclusions can be reached as to which studio produced a majority of local programming (except for January, 1970). The Bureau argues Central's attempt to determine program source by comparing STL logs to program logs was unreliable and was properly rejected. It further notes Central has failed to cite a single precedent that renewal should be denied for relocating a main studio, and has failed to show Cowles did not meet Daytona Beach needs. And while the Bureau disagrees with Cowles over whether the main studio [398] was moved, it cannot agree with Central that Cowles should be disqualified. It notes Cowles made no attempt to deceive the Commission, and it argues Central's attempt to use the *WLBT* decision should be rejected because that case is not on point.

81. The diametrically opposite conclusions which the applicants ask us to reach under the main studio issue underscore a point we have already made: that the essential dispute here is over the inferences to be drawn from the basic facts. After a careful review of the record, we are convinced the Judge committed no error in his handling of the studio move issue. On the record as a whole, he concluded the main studio had in fact been moved to Winter Park, but this move was mitigated by certain factors: the move was not in deliberate corporate defiance of the Commission's Rules, the history of the Orlando

[23] Cowles has filed the compliance report imposed by the Judge's condition that the main studios be reinstituted in the Daytona Beach area.

facilities under Telrad's ownership and Orlando's status as a network reception point had their decisional bearing, the Holly Hill studios had been substantially improved, substantial local programming had regularly been produced at Holly Hill and there were no complaints by Daytona Beach community leaders charging inadequate service to the city of assignment. Our own review convinces us these conclusions are fully supported by the record, and in turn support the conclusion that there has been none of the downgrading of service to the city of assignment which Sec. 73.613 of the Rules is designed to prevent.

82. We find no substantial merit to the applicants' arguments under this issue. Central's argument that the *de facto* studio move requires disqualification of Cowles has no support in precedent or logic. As we see it, Central's position rests on a loose reading of the *WLBT* case from which it fashions its illogical "stout denial" theory. The thrust of this argument seems to be that the vigor of Cowles' denial that the main studio had ever been moved, plus the Judge's requirement that the main studios be reconstituted in the Daytona Beach area, somehow bring this case within the sweep of *United Church of Christ, supra.* We cannot agree. Certainly Cowles is free to press its position without having such "stout" denial treated as independent evidence which somehow aggravates the effect of the studio move. Moreover, this case and *WLBT* are factually inapposite. The requirement that Cowles reconstitute the main studios in the Daytona Beach area is not the equivalent of the one-year renewal which the Court criticized in *WLBT;*[24] there have been

[24] In its reply pleading, Central takes the Bureau to task for alleged failure to participate fully in the hearing, a matter we consider below. Central is also critical because the Bureau, having first

[footnote continued]

no complaints here that the needs of a substantial segment of the public have been ignored by the licensee; and – unlike the *WLBT* case – the conclusions here have been reached after a full hearing.

83. We find no error in the Judge's exclusion of Central's exhibits purporting to show that the Daytona Beach STL was not energized at times. Whether the Daytona Beach STL was not energized at times was immaterial because, as the Judge noted, it was possible for programs produced at Holly Hill to be broadcast over the station's facilities without using the Daytona Beach STL. Moreover, to the extent the proffered exhibits might establish that the "auxiliary" studio was [399] manned at times and the "main" studio was not, the evidence is cumulative. See I.D., para. 73.

84. Nor do we find any substantial merit to Central's arguments which take issue with the Judge's conclusions respecting the factors mitigating the effect of the studio move. Those conclusions rest on findings which are supported by substantial evidence on the record as a whole.[25] However, two aspects of Central's argument deserve attention. We refer first to the Gilchrist testimony, suggesting that Cowles' top management maintained the Daytona Beach studios merely for "window dressing"

proposed that Cowles be given a short-term renewal because of the studio move, failed to except to the Judge's grant of a full-term renewal. The answer to Central's criticism is that the Bureau, as an independent party, is free to take its own position as to what course of action it believes would best serve the public interest.

[25] In this area, Central ignores important findings of the Judge. For example, while heavy duty microwave facilities might be available in the Daytona Beach area, the Judge found such facilities do not have the same flexibility of comparable facilities in the Orlando area. See I.D., fn. 9.

purposes to satisfy Sec. 73.613 of the Rules. Presumably this is the "little" record evidence (I.D., para. 182) of possible deliberate corporate defiance of the rules referred to by the Judge. If this were the sole record evidence on this point, it would put Cowles' actions in a much more serious light. However, Brakefield, who allegedly made the statement testified to by Gilchrist, denied having made the statement. It thus appears, although he did not explicitly refer to this testimony, that the Judge found Brakefield the more credible witness and considered Gilchrist's testimony an insubstantial basis for concluding the studio move was the product of a deliberate corporate decision to defy the rules. Since credibility was for the Judge to decide and since he had the benefit of observing the witnesses' demeanor, we are not disposed to reach a contrary conclusion. The second point involves Central's claim that community leaders who expressed satisfaction with WESH-TV's service to Daytona Beach were selected by Cowles and were not a representative cross-section of the community. While Central obviously disagrees with the conclusion drawn from the testimony of these community leaders, it is silent respecting its own failure of proof on whether the studio move had resulted in a downgrading of service of Daytona Beach. If in fact such downgrading had occurred, it was incumbent on Central to establish this point through its own witnesses. Having failed to come forward with any witnesses who could dispute the testimony of the community leaders who testified for Cowles, that testimony stands uncontradicted and Central is in no position now to complain. Its disagreement with the conclusions does not establish that service to Daytona Beach was downgraded.[26]

85. By the same token, we are not impressed by Cowles' arguments under this issue. What Colwes essentially seeks is a softening of the conclusions and a determination that the studio move never occurred, with a view to removing the comparative demerit assessed against it under the comparative issue. We think the record speaks for itself on this issue and fully supports the Judge's findings and conclusions thereunder. According-

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[26] Our determination respecting the studio move issue is not altered by the letter from Central's counsel, dated December 2, 1975. Counsel requests that the letter be associated with the files of this proceeding. That letter encloses a copy of a release put out by the Katz Creative Services stating that in view of construction difficulties being experienced by the two Orlando VHF stations in connection with their new tower, "[f]or the forseeable future, WESH-TV remains the only Orlando station operating with full facilities." This release is said to evidence WESH-TV's obdurate refusal to take into account the requirements that the main studio be located in Daytona Beach. On December 30, 1975, the Broadcast Bureau filed a motion to strike this letter, contending the use of a letter in lieu of a pleading is unauthorized, and Central – despite its claim the letter is relevant – does not ask that it be made a part of the record. On December 23, 1975, Cowles filed a motion to dismiss Central's letter as an unauthorized pleading, and the Bureau substantially agrees with Cowles' position. Central filed a lengthy and highly irrelevant opposition to Cowles' motion to dismiss on December 31, 1975, and an opposition to the Bureau's motion to strike on January 9, 1975. On January 20, 1975, Cowles filed comments on Central's opposition on the Bureau's motion to strike. The Bureau's motion to strike the letter is granted. Obviously, the letter is a completely unauthorized pleading, and the lengthy arguments which Central makes in its pleadings respecting this letter are nothing more than an attempt to relitigate matters which were covered in depth during the hearing and later. The letter is not a part of this record, and if Central believed the letter was of the decisional significance which it appears to claim, it should have asked to have the record reopened.

ly, we reject Cowles' attempt to obtain these modifications of the decision in this point. We consider below the effect of the studio move on Cowles' comparative qualifications.

The Mail Fraud Issue

86. The thrust of Central's argument under the mail fraud issue is that the findings and conclusions, especially when considered together with the *de facto* studio move, provide a further ground for disqualifying Cowles. Central first cites the Communications Act for unarguable propositions that Congress intended to provide for the use – but not ownership – of frequencies, that the Commission is required to encourage the more effective use of radio in the public interest, and that affirmative public interest findings are needed before a license can be renewed. Continuing in this vein, Central next cites various court decisions to the effect that the Communications Act does not contemplate conferring property rights in a frequency, that radio frequencies are a scarce natural resource, that the paramount public interest to be safeguarded is that of the listening public, that a broadcaster is a fiduciary, that the Commission must consider all factors touching on the public interest, and that a license cannot be renewed unless the public interest would be served.

87. Against this backdrop, Central initially notes its agreement with the conclusion that fraud was "rife" in the PDSs which CCI created. Central then cites several cases holding that a crime in which fraud is an ingredient involves moral turpitude. Central than asks how any public interest finding can be made that WESH-TV should be retained by those who condoned and encouraged acts of moral turpitude. Citing *General Electric Co.*, 22 RR

307 (1961), and *Westinghouse Broadcasting Co.*, 22 RR 309 (1961), Central contends CCI failed to establish corporate policies designed to assure proper top management responsibility for the operation of a broadcast station in the public interest.[27]

88. Taking issue with the Judge's view on the legal effect of the *nolo* please, Central argues the testimony of the 5 PDS dealers revealed fraudulent conduct engaged in by CCI or its PDSs, and the Judge found this testimony "credible and representative." Central then contends that if the Judge believed the dealers, he had to disbelieve CCI. Central further notes that under this issue also, Cowles has "stoutly denied" any wrongdoing. As to what effect all this has on Cowles' [401] character, Central contends neither the record nor law supports the Judge's conclusion that no decisionally material conclusions should be based on that part of the record devoted to the mail fraud issue. Central further charges Cowles has dissembled with the Commission, and the mail fraud permitted Cowles to generate millions in revenues, enabling it to become one of the largest media owners in the country.

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[27] These cases followed termination of Justice Department "price-fixing" suits against GE and Westinghouse, terminated on the basis of guilty and/or *nolo contendere* pleas. In view of the pleas involved, the Commission wrote GE and Westinghouse, requesting submissions on corporate policies and procedures for assuring proper responsibility of top management for operating the broadcast stations licensed to these companies. The later Commission decisions renewing (without hearing) all the licenses involved are reported at 44 FCC (Part II) 2778 (Westinghouse renewals) and 45 FCC (Part II) 1592 (GE renewals). In each case, renewal was based on the response to the Commission's earlier letter, the non-involvement of the broadcast subsidiaries in the price-fixing schemes, and the long, outstanding broadcast record of service in the public interest by the stations involved.

89. Cowles makes an elaborate six-part argument under this issue. The first sub-arguments are highly repetitious and deal in one way or another with CCI's alleged lack of direct involvement in, or legal responsibility for, the conduct of PDS dealers' activities. Cowles notes, for example, the testimony of U.S. Attorney Donielson to the effect the Justice Department felt it had no case against CCI or its personnel. It further notes neither the criminal information nor civil complaint made any charges against CCI. Cowles takes issue with the Judge's findings that the PDS dealers were independent contractors in form only. It argues Cowles acquired the PDSs in good faith and that PDS selling has been publicly accepted for over 50 years. Cowles refers to the increasing measures it took to curb undesirable PDS practices as it became aware of them, and argues there is thus no basis for the Judge's conclusion Cowles chose to remain unaware of misconduct. Cowles' final sub-argument on mail fraud is that there is no finding – or supporting evidence – that there was any connection between the broadcast operations and CCI's conduct in its PDS operations. Thus, Cowles contends, CCI's common ownership of Cowles and the PDSs is not sufficient to attribute any PDS activities to Cowles or CCI's other broadcast properties.

90. All these sub-arguments are pointed to the Judge's ultimate conclusions (I.D., paras. 184-186) on the mail fraud issue. Cowles views the conclusion that CCI acquired subsidiaries for the purpose of engaging in a business which it must have realized would tempt those doing its work to engage in mass fraud as cynical, without record support, and thus an unreasoned inference. It also attacks the Judge's conclusions that CCI's supervision to prevent fraud was ineffectual, and that CCI's own investigations revealed fraud was rife throughout the PDSs.

Cowles argues CCI's delegations of responsibility to PDS management was proper and nothing suggests CCI deliberately isolated itself from knowledge of PDS practices. It argues the Judge simply erred in finding fraud was rife, because CCI neither considered the practices fraudulent, nor of such prevalence as to be "rife." Cowles argues these conclusions disregard the evidence, the dealers' testimony, and Donielson's testimony, and it speculates the Judge so concluded solely because of his personal belief CCI did not act soon enough and its corrective measures proved ineffective.

91. Continuing this line of argument, Cowles says two fundamental findings dictate a conclusion CCI committed no fraud. The first is U.S. Attorney Donielson's testimony (I.D., para. 104 and footnote 18). The second is contained in a set of findings (paras, 197 to 110 of the I.D.) in which the Judge found there was no record evidence to prove the PDSs had actually committed any of the fraud charged in the 50 counts of the criminal information. Cowles says these findings mandate a CCI committed no fraud, and it asks us to articulate such a conclusion.

[402] 92. Finally, Cowles takes note of the Judge's conclusion (para. 186) that the Commission is concerned with non-broadcast activities of applicants only insofar as they might supply some inference as to how any applicant is likely to run a station. But Judge Naumowicz concluded that inasmuch as Cowles was making a full broadcast record at the very time the PDSs were engaged in improper conduct, Cowles' broadcast record (the best indicator of how a station would be run in the future) made it unnecessary to attempt to draw inferences from the non-broadcast conduct of CCI and its non-broadcast

subsidiaries. Cowles argues this conclusion reflects the substance of the Broadcast Bureau's Proposed Conclusion 21, which recognized there was no evidence CCI's PDS conduct carried over to the broadcast operations or would in the future taint Cowles' and CCI's operation of WESH-TV. Cowles contends the Judge's conclusion can be misinterpreted to mean the mere existence of a past good broadcast record sufficies to immunize an applicant against any misconduct in non-broadcast activities. Accordingly, Cowles asks that the conclusions be recast to make it explicit there is no record evidence of any link between Cowles' operation and those of the PDSs, and no evidence such conduct has carried over into past operations of CCI's broadcast stations, or will taint operations in the future.

93. The Broadcast Bureau takes a position midway between the applicants. In general, the Bureau supports the Judge's findings and conclusions under the mail fraud issue, and argues they more accurately reflect the evidence of record than the selective, self-serving modifications which Cowles seeks. But the Bureau does not agree with Central that the PDS activities require disqualifying Cowles. It agrees with Central that a licensee must be law-abiding, but questions Central's reliance on *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954) to support the disqualification which Central seeks. The Bureau argues the question here is not whether Cowles should be punished for fraud in CCI's non-broadcast activities, but whether the conduct was such that it cannot be entrusted as a licensee. *Report on Uniform Policy as to Violations by Applicants of the Law of the United States,* reprinted in 42 FCC 2d 399. The Bureau views Central's argument that fraud in the PDSs evidences a

failure by CCI to assure proper managerial supervision of the broadcast operations as overly simplistic. The Bureau agrees with the Judge that it was unnecessary to seek inferences as to how Cowles and CCI would run WESH-TV because of Cowles' past satisfactory Broadcast record. Finally, the Bureau contends it is not the Commission's function to visit on CCI greater sanctions than those considered appropriate by the U.S. Attorney, the Justice Department, and a U.S. District Court.

94. Cowles' reply pleading adds nothing new. Cowles reiterates its earlier arguments, and notes additionally that it furnished Central and the Bureau with the names of 187 PDS dealers. It then argues the failure of the other parties to call any PDS general manager, operating executive, or salesman supports an inference that had such persons been called, their testimony would have been unfavorable to Central and the Bureau.

95. Two aspects of Central's reply require discussion. First is the manner in which Central views the role which the Broadcast Bureau [403] should play in a comparative hearing. Citing *Associated Press v. United States*, 326 U.S. 1 (1944), and other cases, Central charges the Bureau failed to address itself to wider implications of this case and has ignored constitutional questions implicit in the limited licensing scheme which Central believes perpetuates oligopoly in mass media ownership. Central objects to the Bureau's failure to participate in the comparative aspects of the proceeding. It argues the Bureau should have submitted findings and conclusions on all issues, including comparison of the applicants. Citing its own contentions that the limited licensing scheme requires giving consideration to minority participation in television broadcast operations, Central charges the Bur-

eau has professed no concern for larger issues such as media diversification. It further objects to the Bureau's failure to except to the Judge's decision striking the testimony of the alleged fraud victims, and to rulings limiting the scope of the inquiry under the mail fraud issue.

96. The second matter is the "Martinelli" incident. Martinelli was a PDS dealer and a proposed Bureau witness. The night before he was due to testify, a man who identified himself as John Martinelli called Central's counsel at home. He said he had damaging information about Cowles, but "someone would have to pay for it." On further questioning by Central's counsel, the caller intimated his testimony might differ depending on whether he was paid or not, and implied the price for his testimony was negotiable. Central's counsel informed him there was nothing to negotiate, and he brought the incident to Judge Naumowicz's attention the first thing the following day. A memorandum he prepared respecting the phone call was read into the record. (Tr. 3380-3386). Martinelli was never called by the Bureau, and this incident is not referred to in the Initial Decision. Central points out that this matter was never referred to the U.S. Attorney for investigation, neither Central's counsel nor his wife (who listened to the conversation on a telephone extension) have ever been interviewed by law enforcement officials, and the Bureau never put Martinelli on the stand and never explained on the record its failure to do so. In view of this incident, Central charges the Bureau with failure to protect the integrity of the Commission's process.

97. We have already indicated our essential agreement with the Judge's conclusions under the mail fraud issue,

and except as modified hereinafter, those conclusions are affirmed. Like the main studio issue, this issue involves conflicting facts from which reasonable conclusions might be drawn either way. This again is borne out by the applicant's arguments, which are directed not essentially to the findings, but to the inferences therefrom.

98. The picture which emerges respecting the PDS operations is hardly flattering to CCI. But on the record before us, we agree that Judge Naumowicz was entirely justified in reaching the "harsh" conclusions he did. Whatever the conflict in the testimony, the findings under this issue are correct and establish conduct in the PDSs of sufficient gravity to warrant CCI's coming to Washington to negotiate *nolo* pleas with the Department of Justice on behalf of its subsidiaries. While the *nolo* pleas may provide CCI with a technical legal shield against any inferences that the PDSs engaged in outright criminal fraud, there can be no doubt the PDS practices were (as the Judge [404] concluded) *prima facie* improper and predatory. Moreover, the record supports the main thrust of the Judge's findings that despite CCI's window-dressing efforts to cleanse the PDSs, the real emphasis was on boosting sales rather than preventing unsavory practices; that CCI's own investigations would require it be aware of these practices; that the franchise dealers were independent contractors in form only; that the system of loans from the PDSs to individual dealers gave the PDSs effective control over dealers by the power to cut off essential loans; and that the totality of the relationship between the PDSs and dealers was such as to encourage—if not actually require—the dealers to violate written pledges of exemplary conduct.

99. In our opinion, the weakness of Cowles' arguments lies in its selective approach. Cowles argues, for example, that the Judge was gratuitously cynical in concluding CCI acquired PDS subsidiaries to engage in a business it must have known held temptations for committing mass fraud, and contends this conclusion must be overturned because it is an unreasoned inference. But Cowles ignores other important parts of the record. The record demonstrates the principal business of the PDSs was selling magazine subscriptions, including subscriptions to *Look* magazine, formerly published by CCI. It is a fair inference from the record that the financial success of PDS selling depended in substantial measure on the practices which were investigated by the Post Office Department and the Department of Justice. That the PDSs could operate effectively only so long as they engaged in fraudulent practices is attested to, inferentially, by the finding (I.D. para. 133) that soon after entry of the civil decree (January, 1971), CCI decided to get out of the PDS business.[28] Whether or not fraud was "rife" in the PDSs is largely a matter of semantics. Whether the extent of the fraudulent practices be characterized as "prevalent," "substantial," or otherwise, this would not significantly alter the basic findings on the extent to which those practices prevailed. The same goes for the Judge's conclusions that it is inconceivable CCI could have been unaware of those practices until the government forced its hand, unless it chose to remain unaware. The record fully demonstrates CCI's ever-escalating efforts to stamp out fraud in the PDSs, which efforts permit an inference that even though CCI's

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[28] And as U.S. Attorney Donielson had earlier (and as it turned out, accurately) predicted, the civil decree signaled the death of *Look* magazine (Tr. 4409), which expired shortly thereafter.

eyes were opened by its own investigations, it allowed (while obtaining for appearance's sake written pledges of exemplary conduct from PDS dealers) the PDS practices to continue until the civil decree took the profit out of them. In short, we agree with the Bureau that the Judge's findings and conclusions more accurately reflect the actual evidence of record than the exculpatory modifications which Cowles seeks.

100. But at the same time, we are unable to accept Central's position that the conduct of CCI's PDSs requires disqualifying Cowles on character grounds. Central's reliance on the "stout denial" theory is as illogical and unpersuasive here as it is under the main studio issue. The provisions of the Communications Act and the cases referred to by Central undisputably stand for the general propositions that a licensee does not obtain ownership of a particular frequency under the licensing scheme, that licensees are expected to be law abiding, and the [405] Commission must consider all matters which touch on the public interest. But none of these general propositions are pitched to the precise question before us: Do the non-broadcast activites of the parent corporation's subsidiaries require disqualifying Cowles? In our judgment, the only time Central focuses on this question is when it argues the Judge erred in concluding that in view of Cowles' past broadcast record, it was unnecessary to attempt to draw interferences from CCI's non-broadcast activities as to how the station would be run in the future, and accordingly, no decisionally material conclusion should be based on the portion of the record devoted to the mail fraud issue.

101. In assessing the correctness of this conclusion, several considerations must be kept in mind. Except for common ownership by CCI, there was no connection

between Cowles (the WESH-TV licensee) and the PDSs subsidiaries. Nor is there anything in the record to indicate CCI used its broadcast facilities in any way to promote the subscription selling business of the PDSs. Central's counsel conceded as much at oral argument (Tr. 4669), and Central has made no claim to the contrary. Thus, there is no basis for concluding the PDS practices tainted operation of WESH-TV in the past, and in view of the civil decree and CCI's departure from the PDS industry, the same result clearly attaches to future operation of WESH-TV. Moreover, while it is true CCI was instrumental in negotiating *nolo* pleas on behalf of the PDS subsidiaries, the undisputed testimony of U.S. Attorney Donielson was that the Government felt it had no solid case against CCI or CCI personnel. [29] The main interest of the Department of Justice was in obtaining injunctive relief to protect the public in the future. In fact, it appears the Justice Department, according to Donielson, made it clear to CCI during negotiations that ". . . you are going to pay a price for past misconduct under any circumstances with these subsidiary companies," (Tr. 4406).

102. In light of this particular background, we do not think the Judge erred in refusing to impart decisional significance to matters developed under the mail fraud

[29] Donielson testified "It became clear to me, from a trial lawyer's standpoint, that our case against Cowles was not a good one." (Tr. 4367). ". . . And the Cowles Communications personnel – we just didn't have it." (Tr. 4368). ". . . From what I call a trial-strategy standpoint with Cowles, we had not developed against anything [sic] other than Suhler [the CCI director who served as President of each of the 5 PDSs], and that was very weak, and we didn't get anything against the other parts of Cowles Communications . . . ." (Tr. 4410-4411). "We just had not developed a good case against Cowles in the mail fraud. Mr. Suhler was even problematical, but the civil injunction could be effective." (Tr. 4414).

issue. Nor do we believe that the mail fraud matter justifies imposing a comparative demerit on Cowles. It is clear the renewal applicant was in no way involved in the PDS practices, and judging from Donielson's testimony, the Justice Department felt that no matter what the laxity of CCI's supervision over the PDSs, there was no substantial criminal case against CCI or its personnel. What Central asks us to do is to attribute the sins of the PDSs to CCI, and then visit them on Cowles' head. We cannot agree with this approach. As the Bureau correctly notes, it is not our function to mete out harsher sanctions than those considered appropriate (on the basis of information developed by the Post Office Department's investigation) by the U.S. Attorney, the Department of Justice, and a U.S. District Court. If those arms of the Government with direct and intimate jurisdictional concern with mail fraud matters considered the [406] sanctions adequate, we see no reason to add to them. *Report on Uniform Policy as to Violations of the Laws of the United States, supra.* As we said in the *Westinghouse Station License Renewals* proceeding (where we considered the involvement of Westinghouse's non-broadcast subsidiaries in a price-fixing conspiracy valued at $1,750,000,000 annually), it is not our function to impose additional punishment for such violations of law. (44 FCC 2d (Part II) 2778, at 2784.) Accordingly, we hold that the Judge did not err in refusing to draw conclusions adverse to Cowles under the mail fraud issue.

103. This said, we cannot agree with the full implications of the Judge's ultimate conclusion under this issue (I.D., para. 186), which is open to the interpretation that, in every case, a licensee's good broadcast record immunizes it against the effect of misconduct in the non-broadcast activities of the parent or of related corporations, so

long as the licensee is not tainted by participation therein or has no knowledge thereof.[30] While it may be the Judge did not intend a conclusion of such sweeping implications, we consider it necessary to dispel the possibility of his statement being misinterpreted. Certainly some point is reached where, no matter how superlative a licensee's broadcast record and no matter how guiltless the licensee itself may be, the non-broadcast activities of a related corporation reach such a level of criminality that they cannot effectively immunize the licensee. We make no attempt here to say where the dividing line should be drawn and we are not faced with such a case here. Our purpose is only to serve notice that our affirmance of the Judge does not render unlawful conduct of an applicant in non-broadcast activities irrelevant under the policy statement noted in the preceding paragraph. Moreover, it should be perfectly obvious that if a corporation with both broadcast and non-broadcast activities runs afoul of the law in conducting its non-broadcast activities, it exposes itself to questions concerning its fitness to remain a licensee. We make this point because Cowles complains elsewhere that it was forced into a long and costly hearing which should never have taken place. The short answer to this is that to the extent CCI's non-broadcast activities raised substantial and material questions bearing on Cowles' fitness to have its license re-

[30] Obviously, under this reading, it would be in the best interest of a multi-operation corporation to so structure its broadcast subsidiary as to give it total "deniability" of misconduct elsewhere in the organization.

newed, CCI bears the responsibility for having brought about conditions which unavoidably dictated a hearing.

104. The final consideration remaining under the mail fraud issue is the Martinelli incident. The incident is regrettable. Because the matter first came to our attention in Central's reply pleadings, Bureau counsel was questioned about the Martinelli incident at oral argument before the Commission. We are satisfied that any testimony Martinelli had to offer as a PDS dealer would have been cumulative to that of the three PDS dealers who testified in this proceeding. We think it is further apparent Martinelli tried to "sell" his testimony to Central's counsel for a price, and that once his purpose was exposed on the record by the memorandum of Central's counsel, Martinelli (claiming an urgent financial engagement) returned to Pittsburgh and thereafter made himself unavailable. (Tr. 4723 to 4726.) In our opinion, the Martinelli inci- [407] dent does not require a remand of this proceeding. Central's counsel stated at oral argument (Tr. 4740) he did not seek a remand, and agreed that his comments went more to the manner in which the incident had been handled than to the precise effect of the evidence on this case. (Tr. 4741.) Accordingly, we see no need for a remand, nor (assuming the statute of limitations has not run) do we think any useful purpose would be served by referring this matter to the Department of Justice.

Comparative Consideration of the Applicants

105. Central agrees the Judge correctly concluded the advantage lay with Central on the diversification issue because it has no other mass media interest, in contrast to Cowles' associated mass media interests (Para. 49, *supra*). Central then contends that in *Associated Press v. United States, supra,* the Supreme Court set maximum

diffusion of the ownership of communications facilities as a clear First Amendment objective. It notes our 1965 *Policy Statement on Comparative Broadcast Hearings* and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1971) stress this same objective. Central then argues that under these authorities, diversification is a matter of primary significance and may well be the single most important criterion in choosing between applicants. Accordingly, Central contends, it must receive a "clear and compelling preference" on the diversification factor.

106. Central next takes issue with the Judge's conclusion that Central's diversification advantage need not be compelling unless its ability to render the best practicable service equalled or exceeded Cowles' ability. Central views this conclusion as constitutionally dubious, presumably (although Central does not say so explicitly) in view of the Supreme Court cases cited above. Central then contends its diversification showing is so conclusive it should receive a preference of decisional significance. But assuming *arguendo* the showing is "not compelling," Central ways it should be preferred under the best practicable service criterion solely because (given the main studio move) "it will return the operation of Channel 2 to . . . Daytona Beach."

107. Central then turns to integration of management and ownership, arguing Cowles presents the classic case of absentee ownership with none of CCI's or Cowles' owners residing in the WESH-TV service area. It contends no person active in day-to-day management is an owner of Cowles, and only well after Cowles' license was challenged were any of the station's key personnel elected as officers and/or directors of Cowles. In contrast, Central argues its proposed integration is qualitative, specific and carefully conceptualized. Central admits its management

integration proposals are "perhaps modest under some standards," but it argues that compared with Cowles' total lack of integration, Central's proposal is decisionally significant. Central than lists the various owners and officers who will be integrated into management and the extent of their participation, and notes all of these persons except one are local residents and are dedicated to community affairs.

108. Central next cites *Mid-Florida Television Corporation*, 33 FCC 2d 1, a 1972 Review Board decision which held that black ownership is decisionally significant when reflected in active participation in station [408] affairs. (The comparative proceeding involved in Mid-Florida was later reviewed *sub nom. TV 9, Inc. v. F.C.C., infra.)* Along these same lines, Central contends the Judge's conclusion that neither Mrs. Goddard nor Central had made any effort to determine the workability of any particular programming concept (I.D., para. 146) erroneously interjects programming into this proceeding, contrary to our decision in *Moline Television Corporation*, 31 FCC 2d 273.[31]

109. Central then attacks the conclusion that its proposal to substitute a mobile van for permanent studios in Orlando gives no promise to render service comparable to that available from Cowles' Winter Park studios, making such studios a "definite plus" for Cowles under best practicable service. Central believes this conclusion irrationally faults it for not proposing superior facilities in Orlando (where the station does not belong) and for proposing to return Channel 2 to city of license.

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[31] Central states that in the Designation Order, we found that Central's ascertainment survey and programming proposals were superior. Suffice it to say we made no such finding.

110. In its summarizing conclusions, Central reasserts its alleged comparative superiority under "*every single comparative criterion*" (Central's emphasis) and points to Cowles' weaknesses: mail fraud, the studio move, and CCI's mass media interests. All this is said to require reversal of the Judge. Claiming that diversification reaches a "Constitutional imperative" under the *Associated Press* case, *supra*, and referring to the limited licensing scheme, Central argues industry stability – relied on by the Judge – is not so important that a scarce resource should be retained by those whose concern for profit outweighed their fiduciary obligation. Concluding its arguments, Central says that if the Initial Decision is sustained, "industry stability" will be decisionally equated with "closed fraternity," in derogation of constitutional, judicial and statutory imperatives.

111. Not surprisingly, Cowles agrees with the Judge's selection of it as the best qualified applicant, and its arguments respecting comparative consideration are brief. Cowles argued before the Judge that a renewal applicant should be adjudged solely on its past record.[32] Only under protest did it make a full media interest showing. It argues this media showing is irrelevant because CCI's

[32]The Judge agreed, citing our letter in *Wadeco, Inc.*, 41 FCC 2d 251 (1973). See I.D., para. 191. Central has excepted to this conclusion. While the Judge's position was correct at the time the I.D. was released, the Commission later changed its position respecting the exclusive weight to be given a renewal applicant's past broadcast record in comparative proceedings. Accordingly, para. 191 of the I.D. is corrected to reflect our decision in *Belo Broadcasting Corporation*, 47 FCC 2d 540 (1974), which makes it clear that although we accord primary weight to a renewal applicant's past broadcast record, other comparative criteria under the 1965 Policy Statement will also be considered in comparing a renewal applicant and a new applicant.

media interests are distant from Daytona Beach and the WESH-TV service, are well served by competing media voices, and that to give it a comparative demerit because of CCI's mass media interests would arbitrarily restructure the broadcast industry on an *ad hoc* basis. Cowles then notes that after making its media showing, the Judge refused to permit Cowles to update its media information to reflect certain voting trust agreements involving the Des Moines Register & Tribune's stock ownership in CCI, and Gardner Cowles' stock ownership in Des Moines Register. The Judge based his ruling on the ground that an updating of Cowles' media showing might improve its comparative position. Cowles argues [409] this was wrong, and the Initial Decision now reflects a non-existent state of facts.

112. Cowles next argues the only basis for the required media showing was a dictum in Footnote 36 of the *Citizens Communications Center* case, *supra*. Cowles notes that in Footnote 35 of that case, the Court said factors which might be relevant – at least to an applicant's claim of a superior past record – were the extent to which station profits had been reinvested, and whether the licensee's presentation of news and public affairs programs compared favorably with similarly situated stations. Cowles prepared exhibits describing its investments and improvements of WESH-TV, and a comparison of WESH-TV's news and public affairs programs with that of other stations in Daytona Beach-Orland and Miami. The latter exhibit was rejected on the ground the issues did not call for such a comparison, and the reinvestment exhibit was rejected on the basis of Central's objections. Cowles argues it is unfair to accept evidence under one criterion of *Citizens*, while rejecting it under another.

113. The Judge's conclusions have already been fully digested and will be repeated here only insofar as necessary to provide the background for our rulings. Central is entitled to a preference under the diversification criterion. Its advantage here is clear, given its total lack of any other mass media interests as contrasted with the mass media with which Cowles is associated. While the significance of this preference is reduced – as the Judge noted – by the fact CCI's other broadcast and newspaper interests are remote from Daytona Beach and are not shown to dominate their markets, the fact remains Central is to be preferred under this criterion.

114. For the most part, we find no merit to Cowles' arguments under this criterion. The Judge did not err in requiring Cowles to make a full media showing. See footnote 36 of the *Citizens Communications Center* case, *supra* and paras. 125-129 of the *Second Report and Order in Docket 18110*, 50 FCC 2d 1046, at 1087-88, where we interpreted the impact of that case on comparative proceedings involving a renewal applicant. As for Cowles' reinvestment of profits in WESH-TV, it appears from its earlier arguments that the basic purpose of such improvements was to achieve competitive equality with the Orlando stations. In any event to the extent such reinvestment might bear on diversification (as claimed by Cowles) it would not alter the basic conclusion that Central has the clear advantage under the diversification criterion.[33] Finally, the Judge did not err in refusing to

[33] In compliance with Section 1.65 of the Rules, Cowles has recently informed us CCI disposed of its AM and FM stations in Des Moines, and that CCI no longer owns the licensee of an AM and FM station in Memphis. We note the tender of that information, but attach no decisional significance to these post-decision changes. Moreover, Finding No. 123 is corrected to reflect the fact that the assignment application referred to in that finding had already been granted (October 17, 1973) at the time the Initial Decision was released.

permit Cowles to update its media showing to reflect the two voting trusts. Obviously, the changes involved would have improved Cowles' comparative position. We consider below, in the discussion of Cowles' showing under the best practicable service criterion, why we believe the Judge erred in excluding certain exhibits bearing on Cowles' past broadcast record.

[410] 115. We consider next the conclusion that Central's diversification advantage need not be compelling unless Central could show its ability to render the best practicable service exceeded or equalled that of Cowles. The Judge considered this especially pertinent in the present context, where renewal of Cowles' license would not increase existing levels of concentration which we knew of in approving Cowles' acquisition of WESH-TV and in later renewing the WESH-TV license. The Judge further observed we had not heretofore used the diversification criterion to restructure the broadcast industry to achieve maximum diversification of mass media ownership, and the need for industry stability had its own decisional bearing here. We believe this conclusion fully squares with current Commission policy and the Court of Appeals' decision in *Fidelity Television, supra.* Even in the more compelling situation involving common ownership of a daily newspaper and broadcast stations in the same market, we have determined that, except in a limited number of egregious cases, we will not require divestiture to break up existing concentrations. As we said in Para. 109 of the *Second Report and Order in Docket 18110,* "In our view, stability and continuity of ownership do serve important public purposes." Moreover, in Para. 129 of that same *Report, supra,* we stated:

> . . . In connection with both any policy that may be developed and with comparative renewal proceed-

> ings that may occur before the development of such policy, we do not believe the Court in *Citizens Communications Center* is seeking to have ownership patterns of the broadcast industry restructured through the renewal process; that, rather, any *overall* restructuring should be done in a rulemaking proceeding. And what we consider to be the necessary *overall* restructuring has been done today [i.e., the new rules adopted in Docket 18110].

116. Central's argument that it must receive a "clear and compelling" preference for diversification is without precedential support, if Central means its superiority under diversification is *per se* decisive and renders everything else irrelevant. Central's claim that the Judge's conclusion respecting the less than decisive nature of Central's diversification preference is of dubious constitutionality, is not supported by any citation, although elsewhere in its brief, Central argues that diversification "assumes dimensions approaching a Constitutional imperative under *Associated Press v. United States*, 326 U.S. 1." But nothing in *Associated Press* or other authorities cited by Central says that the public interest in promoting First Amendment objectives through expanding the competing sources of opinion is to be achieved through according decisive weight to an applicant whose proposals would diversify mass media ownership. Even Central is compelled to sound a less positive note in its later arguments (see below) which assume this factor may not be decisive after all.[34]

[34] Central argues the effect of the *TV 9, Inc.* decision in connection with its discussion of the best practicable service criterion, apparently because the Judge considered the proposed participation in station affairs by two black stockholders under this criterion. Central has also asked us to take official notice of the decision in *Leroy Garrett, trading as Garrett Broadcasting Service*

[footnote continued]

117. We consider next the Judge's comparison of the applicants under the best practicable service factor. The thrust of his conclusion is that he considered Central's integration of management and ownership proposals "very weak," with little promise that Central's owners would [411] play a significant role in station affairs. (I.D., paras. 196-201.) In contrast, he found Cowles' past record "thoroughly acceptable" and likely to remain so. The "only blot" on the stations' record was the unauthorized studio move. Although the studio move justified a "comparative demerit," it did not justify a conclusion Cowles was unlikely to continue to provide proper service to Daytona Beach. And although Cowles had to restore the Winter Park facilities to their auxiliary status, these facilities were superior to Central's proposal to use a mobile van to service Orlando and warranted a "definite plus" for Cowles. Finally, making his decisive comparison, Judge Naumowicz concluded Cowles' "distinctive preference" for the best practicable service outweighed Central's preference under diversification. And absent any showing that the concentration which existed when we permitted Cowles to acquire WESH-TV had actually disserved the public interest, the more compelling objective was to select the applicant most likely to provide the best practicable service to the public – namely, Cowles.

118. We are in essential agreement with these conclusions, which on the record as a whole are supported by the weight of the evidence. Except as modified below, those conclusions are affirmed. As explained in greater

(WEUP) v. F.C.C., U.S. App. D.C., 513 F.2d 1056 (1975), clarifying the *TV 9* decision. We do so below in discussing the effect of the *TV 9* and *Garrett* decisions on both the best practicable service and diversification criteria.

detail below, we believe such modifications are in order because Judge Naumowicz made no conclusions of the kind dictated by the *TV 9* decision, and because in our judgment he did not give adequate credit to certain aspects of Cowles' operations and broadcast record.

119. Turning to Central's argument, Central cites no precedent for its argument that assuming its diversification advantage is not *per se* compelling, it should be preferred for the best practicable service solely because it will return Channel 2 to Daytona Beach. The fallacy of this argument is that Channel 2 never left that city. As the Judge noted, it remains assigned to Daytona Beach until reassigned under *de jure* rulemaking, and the conclusion that the main studio was gradually moved to Winter Park by Cowles is not tantamount to concluding Channel 2 was moved to Orlando.

120. Admittedly, Central's showing on integration of management and ownership is somewhat stronger than that of Cowles. This would appear to be inevitable because Cowles is 100% owned by CCI, which is not involved in day-to-day management of the station, but rather operates WESH-TV through locally-resident managerial personnel. But the question here is whether any preference to which Central is entitled under this criterion must, as Central contends, be accorded decisionally significant weight. While Central does not explain what it means by "decisionally significant weight," it appears to attach to its integration proposals the same "compelling" quality which it argues for under-diversification. Assuming we correctly read this premise, we are unable to agree.

121. As the Judge correctly noted in assessing this criterion, *full-time* participation of owners in station

operations on a permanent basis is of substantial importance. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. Little weight attaches to part-time participation primarily on a consultancy basis. *Ibid.* It is fully apparent from the findings and conclusions that Central does not propose that [412] degree of integration which we consider meaningful under the *Policy Statement*, both because of the minor degree of full-time participation and the relative impermanence thereof. Stated, the General Manager will serve only in the "formative stages" of the operation, and Mrs. Goddard will serve only until the station is "thoroughly organized and stabilized."[35] Moreover, the limited integration proposed by Central assumes added significance in light of the complete lack of broadcast experience on the part of Central's principals. Even Central is forced to admit its integration proposal "is perhaps modest under some standards," and that its principals "have never feigned broadcast experience." In our judgment, according Central the decisive preference under integration which it urges on us would seriously erode an important criterion used in comparative hearings. This would be thoroughly unjus-

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[35] Central's claim that the Judge erroneously interjected program proposals into the hearing by finding Mrs. Goddard had no broadcast or programming experience, and neither she nor Central had made any effort to determine the workability of any particular programming content is without merit. *Moline Television Corporation*, 31 FCC 2d 263, 273, is not in point because it does not involve a renewal/new applicant comparison, but rather, a promise vs. performance issue against a licensee involving representations made in earlier initial licensing. We agree with Cowles that in the context here, it is difficult to see how we can conclude a new applicant proposes a better practicable service than the existing licensee without detailing how the new applicant proposes to improve on programming. This unavoidably necessitates some degree of comparison.

tified because after all, when it puts its proposals together, it was entirely within Central's power to decide what roles (and the permanence thereof) its stockholders would play. Having opted for considerably less than meaningful full-time integration, Central is in no position to complain.

122. One remaining aspect of Central's integration proposal is the proposed participation of two black stockholders (Dr. George P. Schanck and Mr. George W. Engram) in station affairs, and the effect of the *TV 9, Inc.* decision on this proceeding.[36] It is not necessary to analyze the Court's original *TV 9* decision at length, because we think the definitive decision is set out in the Court's Supplemental Opinion denying our petition for rehearing *en banc*. *TV 9, Inc. v. F.C.C.*, 161 U.S. App. D.C. 345 F.2d 929, *cert. denied*, 419 U.S. 986, 29 RR 2d 963 (1974). Moreover, the *TV 9* decision was explained by the Court itself in its recent *Garrett* decision, *supra*.

[36] *TV 9, Inc.* v. *F.C.C.*, 495 F.2d 929, 28 RR 2d 1115 (1974). This proceeding appears in the Commission's reports under the title referred to by Central – *Mid-Florida Television Corporation*, 33 FCC 2d 1, a 1972 Review Board decision. The aspect of the Board's decision which is relevant here was its conclusion that under the Commission's Policy Statement [1 FCC 2d 393], "... Black ownership cannot and should not be an independent comparative factor, as Comint would have it; rather, such ownership must be shown on the record to result in some public benefit." 33 FCC 2d at 18. We subsequently affirmed the Review Board's decision, at which time Commissioner Hooks issued a concurring statement, in which he disagreed with the Hearing Examiner and the Review Board that they were barred from awarding a preference to an applicant proposing substantial minority ownership. 37 FCC 2d 559, at 560. This proceeding was appealed to the U.S. Court of Appeals, which expressed its disagreement with the Commission on the black ownership phase of the proceeding. *TV 9, Inc. v. F.C.C.*, *supra*. In its original decision, the Court drew heavily on Commissioner Hook's concurring statement.

There, the Court noted that in the Orlando proceeding, it had addressed itself to a situation where the Commission had refused to accord merit to a contestant for a television channel by reason of the inclusion of two black stockholders in its venture. The Court said that in rejecting the Review Board's and Commission's approach to black ownership (footnote *supra*), it had stated in *TV 9*:

> [413] [M]inority stock ownership of an applicant serving [a] community is a consideration relevant to a choice among applicants of broader community representation and practicable service to the public. The credit awarded due to . . . participation, as part owner, in management is not the same as credit based on broader community representation attributed to [black] ownership and participation.[46] Consequently, we held "that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded, [Footnote omitted] and that "[r]easonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." [Footnote omitted]

[46] [Citation omitted.] In our supplemental opinion, we explained that we had "not relied solely upon minority ownership," but had held "only that [the applicant] was entitled to be accorded merit due to the ownership and participation of" its two black stockholders. . . . We stated further that "[w]hat consideration might be given to ownership of stock alone is not before the court. Nor need we consider whether the primary reliance is properly assigned to ownership or participation, for in this case there is a meaningful combination." Id. at 361 n.1, 495 F.2d at 941 n.1.

123. In Footnote 40 of the *Garrett* decision, the Court explained that in its supplemental *TV 9* opinion, it had distinguished between "merit" and "preference," making it clear the terms are not the same. By "preference" the Court meant ". . . a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns." On the other hand, "merit" or "favorable consideration," the Court went on to say, "is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference. 'Merit,' therefore, is not a 'preference' but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded the preference." Footnote 40, *Garrett* decision, *supra.*

124. Finally, after rejecting the Review Board's approach in the *Garrett* case, the Court went on to say in paragraph 5 of its decision:

> . . . The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to needs of the black citizenry, [Footnote omitted], and that "reasonable expectation," without "advance demonstration," gives them relevance.

125. The Review Board's decision in the Orlando comparative case (which had not yet been decided by the Court) was referred to by Central *sub nom. Mid-Florida* in its proposed conclusions respecting the best practicable service criterion. (Central's proposed conclusion 153). There Central noted the Review Board had held black ownership is decisionally significant when reflected in active participation in station affairs, and it pointed to the proposed participation of Messrs. Schanck and Engram. Although the Judge made findings (para. 150, I.D.) respecting the ownership interests and proposed participation of these two stockholders, the effect of the Review Board's decision – which we had affirmed – was not discussed by the Judge, presumably because the Court's original decision in *TV 9, Inc.* was released only three weeks before the present Initial Decision was issued.

126. The effect of *TV 9, Inc.* was pressed on us at oral argument, because Central's counsel felt the matter had not been adequately dealt with in the Initial Decision. However, he felt it was not necessary to remand this proceeding to the Judge, because the present record was entirely adequate to permit the Commission at this point to con-[414] sider the impact of that decision. (Tr. 4742-43). We agree with Central on both points. Moreover, we agree with Central that we must take the *Garrett* decision into account here.

127. The findings accurately reflect the fact that Dr. Schanck is a vice-president, director and 3.5% stockholder in Central (I.D., para. 141), and that Mr. Engram is a 1.7% stockholder (but holds no official position in Central). (I.D., para. 150). But as Central correctly notes in its exceptions, the Judge failed to find that Messrs. Schanck and Engram (and other Central part-time participants) are community leaders and/or active in community affairs. The testimony of Dr. Schanck (Tr. 1229-54) and of Mr. Engram (Tr. 2445-56) and their biographical statements[37] amply support a finding that these gen-

[37] Some confusion was expressed at oral argument over whether the Judge had excluded biographical data on Messrs. Schanck, Engram and other small stockholders. He did not. The biographical sketch on Dr. Schanck (Central's Exhibit No. 10) was received in evidence at Tr. 1229. Engram's biographical statement (Central's Exhibit 12) was received in evidence at Tr. 2445. Those biographical statements served as the basis for lengthy proposed findings on Messrs. Engram and Schanck (Central's proposed findings Nos. 190-196, and 209-219, respectively), which were for the most part adopted by the Judge.

tlemen have long been, and still are, actively engaged in community affairs within the WESH-TV service area; and we so find. We further find that both Messrs. Schanck and Engram have an awareness of minority group problems within the Daytona Beach-Orlando area, and have contributed to alleviating such problems. This is particularly so with Dr. Schanck, whose personal investment in housing for lower-income groups brings a minimal financial return.

128. The Judge's conclusions further accurately reflect the fact Mr. Engram will devote about 10% of his time to station affairs as an advisor on affairs of the black citizens of the area, and that Dr. Schanck will devote 40% of his time advising the station on public affairs programs and the selection of participants for such programs. In the case of Dr. Schanck, we further conclude that the public affairs programs he is particularly concerned with are those dealing with medical care for the underprivileged, race relations, and the like. We think the record as a whole supports such a conclusion. See Tr. 1249.

129. We now evaluate these findings and additional conclusions in light of the *TV 9* and *Garrett* decisions. It is apparent the black entrepreneurship proposed by Central would tend to promote broader community representation and practicable service to the public by increasing diversity of program content, especially that of opinion and viewpoint. Thus, to use the language of the *TV 9* decision, the diversity which would be promoted by Central's proposed black ownership is definitely in Central's favor, and we conclude Central is entitled to merit for its proposals. But at the same time, we do not think this additional merit, even when considered in conjunction with the slight preference which Central is entitled to for integration and management and ownership, is sufficient-

ly substantial to outweigh the plus-factors in Cowles' favor under the best practicable service criterion.[38] The combined ownership of Messrs. Schanck and Engram (5.2%) is [415] relatively small, compared to the combined 14% black ownership in *TV 9*. And while their potential for contributing to program diversity is not necessarily limited by the size of their stock holdings, their proposed part-time participation (and especially the 10% proposed by Engram) suggests that any merit stemming from their participation is diminished. Even in the case of Dr. Schanck, who proposes to devote 40% of his time, it appears his participation would be limited more to selecting participants for public affairs programs rather than directly advising on such programs.[39] In view of all this, we cannot agree with Central that the ownership interests and participation of Messrs. Schanck and Engram require a preference under the best practicable service standard.

130. Further, in assessing the quality of Central's integration proposals, we think that our decision in the *RKO General* case (28 RR 2d 1501 (1973), aff'd *sub. nom. Fidelity Television, Inc. v. FCC, supra*), which was released shortly before the I.D. in this case, has special

[38] Of course, to the extent black ownership imparts additional merit to our policy goal to diversify the ownership and control of mass communications media, Central's clear advantage under the diversification criterion is increased. But additional enhancement of its diversification preference does not make that preference "compelling" (to use Central's words), for reasons already discussed above.

[39] Compare his testimony on cross-examination which suggests a broad, undefined approach to his role (Tr. 1249) with his earlier admission that he would not be advising Central on medical problems of the underprivileged because "that would come under programming" and that he would not be advising on health problems caused by pollution (for reasons never explained). (Tr. 1239).

pertinence here. In many ways, the instant case and the *RKO* case are remarkably similar. Both involve challenges to an existing licensee by a newcomer in a comparative renewal proceeding; both involve charges of wrongdoing by related corporations associated in ownership with the licensee; and both involve licensees owned by absentee multiple owners who have delegated the responsibility for day-to-day station operations to locally resident management teams. In the *RKO* case, we noted that the challenger had a quantitative edge over RKO under the integration criterion. In fact, the showing was much stronger in *RKO,* where stockholders owning almost 23% of Fidelity's stock would be integrated on a full-time basis, in contrast to the single 3.5% stockholder here with full-time integration. (I.D., para. 199). But in *RKO,* we noted that the challenger's quantitative superiority for integration was partially offset by the autonomy which RKO accorded its local station staff to use their familiarity with area needs in developing appropriate programming. That same observation applies here.

131. As noted earlier, this case was tried under the earlier ruling when we said that the renewal applicant's past record was the sole basis for projecting probable future performance. See I.D., par. 191. For this reason, the Judge made no conclusions respecting Cowles' integration proposals, even though Cowles had included contingent conclusions on this point in its proposed findings and conclusions. Those proposed conclusions (Nos. 137-150), which are fully supported by substantial evidence in the record, show that WESH-TV is operated by a substantially autonomous local management team. Two of Cowles' three directors reside in the areas where the station maintains facilities. John Haberlan, Cowles' president, general manager and director (who is also an officer

of CCI) resides in the Orlando area and has long been active in local civic affairs. Walter Strouse, Cowles' executive vice-president, a director, and station manager of WESH-TV, has been with the station since 1956 and resides in Daytona Beach. He, too, has long been active in civic affairs. Two other [416] officers, John Hitchcock (assistant station manager) and Nicholas Pfeifauf (director of community affairs for WESH-TV) reside respectively at Winter Park and Holly Hill, and both are involved in local community affairs.[40]

132. The conclusions herein are modified to reflect the foregoing information. In our judgment, the record fully establishes the autonomy which the parent corporation accords the local management team of WESH-TV. Moreover, the active participation of resident officers in civic affairs within the Daytona Beach-Orlando area lends assurance there is and will be continuing sensitivity to area needs and interests, a conclusion further buttressed by the continuing ascertainment procedures which Cowles has had in effect since 1968. (Cowles' proposed conclusion 104).

133. In view of the foregoing, the Judge did not err in refusing to grant Central a preference under the integration criterion. We recognize that certain aspects of Central's integration proposals warrant a "merit," to use the language of the Supplemental Opinion in *TV 9,* but we do not think that merit is sufficiently substantial to jus-

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[40]Cowles' third director, Gardner Cowles, is chairman of Cowles' board of directors. He visits the station for about one day every three months. Cowles' secretary (John Harding, since deceased), also served as CCI's General Counsel. Marvin Whatmore, Cowles' treasurer, is also president of CCI. Mr. Whatmore is not an area resident, but he does have a long record of experience in broadcasting, as does Gardner Cowles.

tify a preference. Again, we return to a point we made above: Central was responsible for the structure of its organization, the degree of integration of management it proposed, and the specific type of service it proposed. And if its proposals prove insubstantial, the fault lies with Central. Accordingly, we conclude that the integration proposals of both applicants are substantially similar, and neither is entitled to a preference for such proposals, though Central's warrants a "merit."

134. We turn now to the plus factors which the Judge accorded Cowles under the best practicable service criterion: Cowles' "thoroughly acceptable" past record of broadcast service and the "definite plus" attaching to its auxiliary Winter Park facilities. The only blot on Cowles' record is the studio move, which was sufficient to warrant a comparative demerit, but insufficient to justify a conclusion Cowles would be unlikely to continue to provide proper service to the community. This combination of pluses gave Cowles a distinctive preference under the best practicable service standard, which outweighed Central's preference under diversification. Moreover, in the absence of any showing that the concentration which came about when we permitted Cowles to acquire WESH-TV from Telrad had disserved the public interest, the more compelling public interest objective was in selecting the applicant most likely to provide the best service.

135. We agree with the conclusion that Cowles is entitled to a "distinct preference" for the best practicable service. But in two respects, we cannot agree with the Judge's conclusions under this criterion.

136. Initially, we do not believe that in the circumstances, Cowles should get a "definite plus" for the superiority of its Winter Park auxiliary studios, as compared to the mobile van service which Central proposes to meet

viewer needs in the Orlando area. We can appreciate the technical and physical superiority of permanent auxiliary studios over a mobile van service. But in view of the *de facto* move of the main [417] studio to Orlando which the Judge found had occurred, it is fair to assume that, in considerable measure, the physical superiority of Cowles' Winter Park facilities stemmed from circumstances which in the Judge's view warranted a comparative demerit against Cowles. Given this, the award of a definite plus to Cowles under the best practicable service criterion was improper, and the Judge's conclusion on this point is overruled.

137. Our other area of disagreement with the Judge involved Cowles' past record. We are unable to accept the Judge's characterization of Cowles' record as "thoroughly acceptable," and we do not adopt it. The term is too vague to be meaningful, as evidenced by the diametrically opposite positions which the applicants again take respecting the conclusions. As much as Central can muster against Cowles' record is the argumentative charge that the record is "*thoroughly unacceptable*" (Central's emphasis) because the studio move issue shows that Cowles abandoned its city of license. On the other hand, Cowles argues WESH-TV's record is superior, justifying a "plus of major significance" under *Citizens Communications Center v. FCC, supra.*

138. Since this is a comparative hearing involving a regular renewal applicant and a newcomer, it comes within the *Citizens Communications* case, *supra.* The standards defining "superior" service have not yet been formulated and in any event would not apply to this proceeding in view of what we said in para. 10 of the *Notice of Inquiry in Docket 19154,* 27 FCC 2d 580 (1971), in which Docket such standards are being considered.

Accordingly, this proceeding should be decided on the record compiled at the hearing (*Moline Television Corp.*, 31 FCC 2d 263, 268 (1979)), at the same time giving primary, although not exclusive, weight to Cowles' past broadcast record. See *Belo Broadcasting Corporation, supra.*

139. In the *Citizens Communications* case, the Court noted that a most important factor in a renewal proceeding is an incumbent's past record. It went on to note that:

> . . . Insubstantial past performance should preclude renewal of a license. The licensee, having been given a chance and having failed, should be through. . . . At the same time, *superior* performance should be a plus of major significance in renewal proceeding. (145 U.S. App. D.C. 44, 447 F2d 1213, emphasis in original)

Further, in Footnote 35 of the case, the Court said it recognized that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.[41] It is against this background that we consider Cowles' past record.

140. We have already indicated our disagreement with the term "thoroughly acceptable" used to describe Cowles' past record. In our judgment, that term does not adequately reflect the outstanding quality of Cowles' past performance. We have examined the record with particular care and we believe that record fully warrants a conclusion that Cowles' past performance has been

[41] In the earlier *WHDH* case, the Court referred to a renewal applicant's ". . . legitimate renewal experiences implicit in the structure of the [Communications] Act. 143 U.S. App. D.C. 383, 444 F2d 841 (1970).

superior, meriting a plus of major significance. We turn now to the reasons which in our judgment compel this conclusion.

[418] 141. A key factor in the appraisal of a renewal applicant's past performance is the station's community involvement, a point we stressed both in the initial *Notice of Inquiry in Docket 19154* and in *Moline Television Corp., supra.* Judge Naumowicz made detailed findings on the local program series which WESH-TV presented during the license period in question (I.D., paras. 124-138), and it is unnecessary to repeat those findings here. Suffice it to say we agree completely with the Judge that these findings support the subsequent conclusion (I.D., para. 202) that Cowles had ". . . evolved and presented a substantial number of programs and program series designed to serve the needs and interest of the community."

142. But we do not think the findings adequately portray the full extent of Cowles' community involvement, and we accordingly refer to other parts of the record – not specifically adverted to by the Judge – which reinforce our conclusion that WESH-TV has been solidly involved in the community life of the Daytona Beach-Orlando area. For example, Cowles has been sensitive to the needs of the Black-American community, as shown by its particular efforts to provide programming on behalf of Bethune-Cookman College, a Daytona Beach Black-American liberal arts college. As Cowles points out, it presented the college choir and the President's Christmas message, publicized musical events at the school, and presented 21 *Minute Memos* on behalf of the United Negro College Fund Drive and Bethune-Cookman during 1969. Further, in 1969, Cowles expanded its college scholarship program to include Bethune-Cookman Col-

lege, thus making available a $1,500 annual scholarship to a deserving Black student at Bethune-Cookman. (Cowles Exhibit 109). As further evidence of WESH-TV's community involvement, we take note of the *Topic* program, a regularly scheduled weekly half-hour public affairs program which was broadcast 141 times during the license period. (I.D., para. 125). The detailed proposed findings – which are supported by substantial evidence – respecting this program show that through the *Topic* series, WESH-TV has informed the community on a variety of critical problems of interest to area viewers, such as urban renewal drug abuse, alcoholism, crime, beach erosion, education, etc. This program series and the station's other local news and public affairs programs have quite obviously contributed substantially to an informed electorate, an important goal of the inquiry in Docket 19154. Moreover, it is apparent the format of many of the programs discussed in the findings is such as to permit and encourage participation by local community leaders. Further contributions to an informed electorate have come through WESH-TV's regularly scheduled editorials. And when such editorials have involved controversial issues of community interest, WESH-TV has offered an opportunity for response to the station's editorial views.

143. Other evidence of Cowles' solid commitment to community life is contained in statistics for the composite week of 1970. For that composite week, 34% of WESH-TV's news programs were devoted to local and regional news. (I.D., para. 131). With reference to that composite week, we additionally find that 11.36% of the station's total programming was devoted to news, and 4.47% to public affairs. Additionally, 12.75% (16 hours and 37 minutes) of total programming was [419] devoted to local programs, of which 3 hours and 4 minutes were broadcast between 6 and 11 p.m.

144. Another important index in judging a renewal applicant's past performance is the locality's estimate of the applicant's service, *Moline Television Corporation, supra.* On this point, Cowles' record is definitely outstanding. As noted by Judge Naumowicz (I.D., paras. 139, 202), a number of local residents and community leaders presented opinion evidence respecting WESH-TV's service to the community, and the consensus of their testimony was that the station had been cooperative and sensitive to the needs of the witnesses' constituencies. Moreover – and we consider this crucial – no contrary opinions were offered. The Judge's findings and conclusions on this point have solid support in the record evidence.

145. For the record, we set out some examples of the testimony by the public witnesses,[42] because the findings do not do full justice to the excellent quality of cooperation between WESH-TV and local community leaders. *Mrs. Thelma Schlossberg,* active in Service for the Blind, stated in her affidavit that WESH-TV had produced a documentary explaining the work of her organization and had assisted in the annual recruitment drive for volunteers to transcribe the printed word into Braille. She stated the station had been an inspiration to her work, cooperative and helpful. *Carroll Atkinson,* a professor at Bethune-Cookman College and father and manager of the "Three Young Atkinsons," stated the station had been cooperative and sensitive to the need for developing local talent. *William F. Monfort,* District Director of the Muscular Dystrophy Associations of America,

[42] By written affidavit, Cowles offered the testimony of 56 public witnesses, which were received in evidence by the Judge. In addition to their affidavits, a number of these witnesses testified orally.

said the station had always given excellent support to his group and he believed that in connection with the Jerry Lewis Labor Day Telethon, WESH-TV's use of its dual studios on behalf of the MDA drive involved "exciting professionalism." *Tony Mateka,* active in the Civitan Club; *Thomas Brownlee,* Executive Vice President of the Orlando area Chamber of Commerce; *Dr. Phillip Flechaus,* a Daytona Beach surgeon who is active in several community organizations; and *Rogers P. Fair,* Chaplain of Bethune-Cookman College, offered similar testimony of the excellent cooperation their groups had received from WESH-TV.

146. We are further impressed by the testimony of several local government figures, which in our judgment further confirms the outstanding service which WESH-TV has offered the community. *Mayor Richard Kane* of Daytona Beach testified orally. He appeared on WESH-TV a number of times, both in connection with his campaign for office and as mayor. Mayor Kane cited two instances in which WESH-TV had been particularly sensitive to the public needs. At one time, a garbage strike had created a health crisis in Daytona Beach and a public appeal was made over WESH-TV to have local residents place their garbage at the curb to assist inexperienced garbage collectors. (Tr. 1658-59). Neither of the Orlando TV stations carried the Mayor's personal appeal. (Tr. 1666) At another time, when Daytona Beach was having racial trouble, Mayor Kane went to WESH-TV about 11 p.m. during one such disturbance and gave a conciliatory message, which he considered "very helpful . . . because we were able to get out to the [420] public what the real situation was on the racial crisis." (Tr. 1659-60). Neither of the Orlando TV stations carried Mayor Kane's appearances during the racial disturbances. (Tr. 1666). *Carl T. Langford,* Mayor of Orlando, has appeared frequently on

WESH-TV, using the Winter Park facilities. He found all three area TV stations helpful in covering local matters such as the airport expansion referendum, a new municipal justice building, the sale and purchase of city land, etc. He thought the cooperation of WESH-TV was equal to that of the other two area stations, but he did not characterize WESH-TV's operation as superior. He also testified WESH-TV had covered most of the Orlando City Council's weekly meetings, but not all. *Frederick B. Karl,* a State senator, one-time gubernatorial candidate, and former City Attorney of Daytona Beach, made a number of appearances over WESH-TV. He testified he used Channel 2 to generate public support for a controversial new city charter for Daytona Beach. He often made suggestions to WESH-TV respecting what he thought were newsworthy events. He was never completely rejected by the station, but, rather, was either offered time for presenting a particular news item or was assured the event would be covered either in the newscasts or on the *Topic* program.

147. Another important consideration in appraising a renewal applicant's past performance is the matter of complaints against a station. Through our concurring oversight of television stations, we know that when a station's program service or operations fall below community expectations, the public is quick to let us know. Complaints might cover a variety of matters: unfair editorializing, charges of slanted news coverage, ignoring the needs of a particular segment of the viewing public, the failure to comply with the fairness doctrine, overcommercialization, rigged contests, advertiser complaints of double-billing, etc. But whatever its nature, a complaint suggests that something is wrong with the station's service operations. Here, Judge Naumowicz properly concluded that ". . . *significantly, the record lacks*

evidence of any complaints as to how the station has been run." (I.D., para. 202, emphasis supplied.)[43]

148. Finally, there is the matter of Cowles' performance *vis-a-vis* similarly situated licensees. We agree with Cowles that the Judge should not have excluded proffered evidence of such performance, because as we pointed out in the *Moline* case (31 FCC 2d at 296), a comparison of a licensee's programming with ". . . the efforts of like stations in the market or elsewhere" is relevant in weighing an applicant's past broadcast record. Evidence involving such a comparison of records is clearly admissible under *Moline*, and objections, if any, go merely to the weight of the evidence. (Here we note parenthetically that Central's objections to the excluded portions of Cowles' Exhibit 116 were based on the ground such evidence was outside the designated issues and by a reference to *The Evening Star Broadcasting Co.* case, 27 FCC 2d 316, which predates *Moline*. See Tr. 819 *et seq.* When [421] Cowles later relied on the *Moline* case in its proposed conclusions of law, Central did not dispute the applicability of *Moline* in its reply findings).

149. The pertinent portions of Exhibit 116 (pp. 6 & 7 thereof) furnish further compelling proof of the superiority of Cowles' past performance. Exhibit 116 contains

[43] In an unopposed petition for leave to amend, Cowles informed the Commission on April 3, 1975 that two persons had filed complaints against it with the Equal Employment Opportunity Commission. In a later unopposed petition for leave to amend filed on June 16, 1975, Cowles informed us that the Miami District Director of EEOC had determined the complaints were without reasonable basis. For record purposes, these petitions for leave to amend are granted, even though – as Cowles correctly notes – they have no bearing on the issues and result in no comparative advantage or disadvantage to any party.

composite week data for licenses expiring in 1970. In that composite week, 11.36% of WESH-TV's total broadcast time was devoted to news programs and 4.47% to public affairs programs. In that same period, 12.75% of broadcast time was devoted to locally originated programming. Comparable data from the renewal application of the CBS affiliate serving the Orlando-Daytona Beach area shows the CBS affiliate in the same period devoted 8.05% of total time to news, and 3.19% to public affairs programs. The CBS affiliate presented 7.72% of locally-originated programs. Page 7 Exhibit 116 further shows that the average percentage of total composite week program time devoted to news and public affairs programs for network affiliates in the Top 25 markets, as reflected in renewal applications filed between 1966 and 1969 is as follows: CBS – 11.47%, NBC – 13.05%, and ABC – 8.52%. As is evident from page 6 of Exhibit 116, WESH-TV devoted a total of 15.83% of broadcast time to news and public affairs programs. In terms of locally-originated programming, network affiliate averages for the Top 25 markets are: CBS – 13.8%, NBC – 14.99%, and ABC – 14.28%. While not exceeding these averages, WESH-TV's percentage of time devoted to locally-originated programs (12.75%) reasonably approaches the affiliate averages for the Top 25 markets.[44]

150. In our judgment, the comparative data showing how Cowles has performed *vis-a-vis* other stations, both in its own market and elsewhere, is further evidence of the excellence of Cowles' past performance. In short, this

[44] Like the Judge, we decline to take official notice of statistical data in Appendix D attached to Cowles' proposed findings and conclusions. This data was never offered at the hearing, and, accordingly, Central never had an opportunity to object thereto.

comparative performance is another significant plus to be weighed in assessing WESH-TV's record.

151. In view of all the foregoing considerations, we are convinced Cowles' past performance has been superior, justifying a plus of major significance within the meaning of the *Citizens Communications* case, *supra.* That conviction is reinforced by the uncontradicted nature of the testimony in this area. Significantly, the Judge found Central had offered no contrary opinions of community leaders or public witnesses suggesting that WESH-TV's service was deficient, nor did it offer any evidence of complaints against WESH-TV. As we have already noted, all that Central can muster against Cowles' past performance is the argument that its service is "thoroughly unacceptable" in light of the studio move, and the complaint the public witnesses were selected by Cowles. But invective of this kind is not evidence. Central has long known that if it wished to displace Cowles it would have to prove, *inter alia,* that Cowles' past performance was below average. Throughout this proceeding, it had every opportunity to prove this point, or at least offer some evidence that there was public dissatisfaction with the station's service. Having utterly failed to do so, the only reasonable [422] conclusion is that no evidence exists of sub-standard performance by Cowles. On the contrary, as we have already pointed out, the evidence fully justifies a conclusion Cowles' past performance has been superior.

152. In reaching this conclusion, we are aware that a measure of subjectiveness is unavoidably involved, given the absence of standards defining "superior" service. But our conclusion is based – as pointed out earlier – on our administrative "feel" acquired through years of overseeing television operations. In our judgment, if past performance of the kind demonstrated here is not regarded as "superior," then there is a substantial danger incumbents will be tempted to lapse into mediocre performance. This would be contrary to the public interest, because as the Court recognized in footnote 35 of the *Citizens Communications* case, *supra*, ". . . the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service."

153. We come now to the final comparative evaluation of the applicants. Central has in its favor a clear preference under the diversification criterion. Under the best practicable service criterion, while Central is entitled to a merit for the Black ownership it proposes, we have concluded in view of the overall weakness of Central's integration proposals that neither applicant is entitled to any preference for its integration proposals, para. 133, *supra.* On the other hand, Cowles is entitled to a distinct preference under the best practicable service criterion in view of its past superior performance. The "only blot" on Cowles' record (to use the Judge's words) is the studio move, which justifies a comparative demerit against Cowles. But since the studio move did not result in any downgrading of service to Daytona Beach (para. 84, *supra*), this demerit does not diminish Cowles' distinct preference for the best practicable service. In view of the legitimate renewal expectancies of an incumbent, especially where the licensee's past performance has been superior, and further in view of our judgment that the licensee renewal process should not be used to restructure the industry, we conclude that Cowles' distinct preference to render the best practicable service to the public outweighs Central's clear preference under the diversification criterion.

154. We have saved for the last a charge which Central makes early in its supporting brief. Central argues that it was denied its rights under *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945) because it was hampered throughout by various rulings of the Judge and the Review Board in fully developing the record. Had permissible inquiry been allowed, Central argues, there would have been further reinforcement for the findings Cowles' main studios were in Winter Park, and that CCI had created an organization "rife" with fraud. Additionally, Cowles would not have been permitted to "bootstrap" its programming for the relevant license period, and the Judge would have been less disposed to manifest a "curious neutrality" toward Cowles.[45]

155. We cannot agree Central was denied its *Ashbacker* rights. Undoubtedly, as Cowles and the Bureau point out, the hearing may not [423] have been perfect in every respect and errors may well have been committed. Central's disappointment is understandable, but this does not mean it was denied a full and fair hearing. Upon consideration of the lengthy record in this proceeding, we are satisfied Central has suffered no prejudicial error under the rulings it complains of in its exceptions (see Appendix hereto). We therefore reject the argument that Central's *Ashbacker* rights were violated.

156. ACCORDINGLY, IT IS ORDERED, That the motion to correct transcript of oral argument, filed December 31, 1974, by Central Florida Enterprises, Inc., and the motion to correct transcript of oral argument,

[45] Apparently this latter reference is designed to bring this case within the orbit of *United Church of Christ* decision, *supra*. We have already said that that case is inapplicable here (see par. 82, *supra*).

filed January 6, 1975, by Cowles Florida Broadcasting, Inc. (WESH-TV), ARE GRANTED.

IT IS FURTHER ORDERED, That the motion to correct transcript, filed April 16, 1975, by Cowles Florida Broadcasting, Inc. (WESH-TV), IS DENIED.

IT IS FURTHER ORDERED, That the motion for declaratory relief, filed July 24, 1975, by Central Florida Enterprises, Inc., IS DENIED.

IT IS FURTHER ORDERED, That, in view of the withdrawal of the Association of Maximum Service Telecasters (AMST) from these proceedings, AMST SHALL in no way participate in any further proceedings involving the referenced applications, nor shall it make any reference to the proceedings on these applications and or any facts or circumstances involved here in any presentations by, or participation of, AMST in the inquiry instituted in Docket 20418.

IT IS FURTHER ORDERED, That the application of Central Florida Enterprises, Inc., for a construction permit for a new television station to operate on Channel 2, Daytona Beach, Florida, (File No. BPCT-4346) IS DENIED.

IT IS FURTHER ORDERED, That the request of the Broadcast Bureau for addition of a further condition, filed December 26, 1973, IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED, That the petition for leave to amend its modification application, filed January 17, 1975, by Cowles Florida Broadcasting, Inc., (WESH-TV), IS DENIED, and the supplements to said petition for leave to amend, filed March 31, 1975 and August 8, 1975 by Cowles Florida Broadcasting, Inc. (WESH-TV) ARE DISMISSED.

IT IS FURTHER ORDERED, That the application of Cowles Florida Broadcasting, Inc. (WESH-TV) for modification of authorized facilities (File No. BPCT-4158), IS DENIED.

And, IT IS FURTHER ORDERED, That the application of Cowles Florida Broadcasting, Inc. (WESH-TV), for renewal of the license of station WESH-TV, Daytona Beach, Florida (File No. BRCT-354) IS GRANTED.[46]

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[424] APPENDIX

Rulings on Exceptions of Central Florida Enterprises, Inc.

(A) *Exceptions to rulings of the Administrative Law Judge.*

Exception No.	*Rulings*
1	*Denied.* The Judge correctly ruled the motion to produce was unreasonable in scope, and Central was free to resubmit its request in the event documents sought were not "obtainable by the interrogatory route." Tr. 46.
2-14	*Denied.* Not of decisional significance in view of our denial of the short-spacing waiver requests. Docket 13440 standards are not applicable here. See pars. 37-38 of this decision.
15	*Denied.* Not of decisional significance in view of our disposition of the "mail fraud" issue.
16-17, 20-21, 28, 33-34, 41, 53-54, 67, 73, 93	*Denied.* The license renewal period in issue was from February, 1967 to February 1970 (Tr. 553). Central's theory is that because *Immaculate Conception Church of Los Angeles* v. *FCC*, 320 F.2d 795, 25 RR 2128(a) prohibits a renewal applicant from upgrading his programming after the end of a license period, *all* matters outside the license period are not germane. Tr. 555. The Judge correctly ruled this case applies to efforts to update programming (Tr. 566), and indicated he would not look at programming beyond February, 1970. But *Immaculate Conception, supra,* did not bar him from considering other relevant, non-programming matters beyond that date.
18-19, 22-27, 29-31, 35-40, 42-49, 51-52, 55-66, 68, 75-76, 85-92, 94-96, 117, 120-121, 126-129, 134, 138-143, 152, 154	*Denied.* These exceptions invole rulings by the Judge either admitting or excluding exhibits or testimony on various grounds of materiality, relevancy, competency, or cumulativeness. As such, the rulings involve the broad discretion of the Judge to admit or exclude evidence on grounds of materiality, relevancy, etc. In each case, the particular ruling of the Judge was reasonable and did not result in either the admission or exclusion of evidence in a manner prejudicial to Central.
32	*Denied.* The alleged superiority of Cowles' Winter Park facilities was fairly encompassed by the issues, and Central was afforded an opportunity to prove the contrary.
50	*Denied.* See par. 91, I.D., and ruling on exceptions 16-17 *et seq., supra.*
69-72, 74, 77-82, 84, 97-98, 100-102, 118, 119, 122, 151	*Denied.* Matters encompassed by these exceptions are irrelevant to the issues, and the Judge's evidentiary rulings thereon were proper.
83	*Granted.* The leading question to Brakefield was improper as a foundation question. However, it is fair to assume the substance of Brakefield's denial would have been adduced on subsequent proper questioning.
99	*Denied.* Harding's participation in a profit-sharing plan did not render his testimony incompetent.

[46] In view of our action herein, Central's motion for decision, filed May 12, 1976, is also dismissed as moot.

103-105	*Denied.* See par. 74 of this decision.
106	*Denied.* Central made no motion to produce but merely an inquiry as to how far procedures of *Telecable Corporation, Inc.*, 19 FCC 2d 574, would apply. See Tr. 3006.
107	*Denied.* Whether Harding had read the *Telecable* case is irrelevant.
108, 113	*Denied.* The Judge correctly ruled Central's showing had to be limited to subsidiary corporations of obvious pertinence to the issues.
[425] 109-110	*Denied.* The Judge's interpretation of the *Telecable* case was not erroneous.
111-112	*Denied.* Central failed to pursue the opportunity afforded by the Judge to set up procedures to pursue the matter further (i.e., receipt of Central's proffered exhibits). Tr. 3069, 3074.
114-116	*Denied.* Of no decisional significance in view of our disposition of the "mail fraud" issue.
123-125	*Denied.* Questions here involve allegations going to entire PDS industry, and not CCI alone.
130-133, 135	*Denied.* Postal Inspector Ludtke made it clear he refused to testify on grounds of privilege, and the Judge was accordingly justified in not issuing a subpoena.
136-137, 144-146, 153, 156-159	*Denied.* Irrelevant, and of no decisional significance in view of preference awarded Central on the diversification factor.
147-149	*Denied.* U.S. Attorney Donielson was obviously one of the best qualified witnesses respecting the Government's thinking on PDS activities and the lack of any strong case against CCI. See fn. 18, I.D.
150	*Denied.* The Judge properly ruled the question was argumentative.

155	*Denied.* Alleged delay was never substantiated in Central's proposed findings, as requested (Tr. 4581) by the Judge.

(B) *Central's exceptions to miscellaneous interlocutory rulings.*

160	*Denied.* Reason for exception to par. 25 of Designation Order is not explained. In any event, see discussion and amended Designation Order in *Cowles Florida Broadcasting Inc.*, 32 FCC 2d 436.
161	*Denied.* The sweeping breadth of Central's motion to produce is evident on the face thereof, and the Judge correctly ruled (Order, FCC 71M-724) that the request to produce operational documents was oppressive and burdensome. The Judge's remarks (Tr. 44-46) and his Order required Central and Cowles to meet in an effort to accommodate Central's request for relevant documents and provided for resubmission of Central's request if no accommodation could be reached.
162-169	*Denied.* The Judge did not err in his Order (FCC 71M-724) denying Central's motion for production of various documents which were described "in 55 paragraphs spread over 36 pages," on the ground the request was far too broad, would be oppressive to Cowles, and to be grantable, would require a drastic streamlining of the request. Moreover, as the Judge correctly noted, Central seems to have misconceived the scope of the "mail fraud" issue designated herein as one requiring, in effect, trial of the 50 mail fraud cases involved in the criminal information. It was never our intention that those cases be in effect relitigated before us. As noted elsewhere herein, mail fraud matters fall within the jurisdiction of other branches of the Government, and it would be unreasonable to expect the Commission to "retry" mail fraud cases. As for the *Uniform Policy on Law Violations*, the failure of the Judge to mention this policy is cured by par. 102 of this decision.

[426] 170-171 *Denied.* It was within the Judge's discretion to rule that Central's motion requesting production of "all" correspondence between persons associated with Cowles and "other persons" respecting preparation and filing of Cowles' modification application was unreasonable in breadth and unduly burdensome.

172-173 *Denied.* Our own review confirms the correctness of the Judge's reasoning that allowing an appeal from the Order denying Central's motion to produce (Exceptions 162-169, *supra*) should be denied, because it was unlikely any possible restrictions on discovery would require remand.

174 *Denied,* for reasons stated in the ruling on Exceptions 162 to 169.

175-200 *Denied.* We find no error in the Review Board's Decision (32 FCC 2d 436) reformulating the mail fraud issue and denying modification of that issue as proposed by Central. Essentially, we agree with the Broadcast Bureau that the Board did its best to understand Central's rambling and often imprecise contentions respecting numerous Federal and State court proceedings, and Central's present exceptions are an effort to sharpen its earlier pleadings. In any event, these exceptions are not of decisional significance in view of our disposition of the mail fraud issue herein.

201-202 *Denied.* The 1965 *Policy Statement on Comparative Broadcast Hearings* has no application. See fn. 1, 1 FCC 2d 393. See also par. 129, Second Report and Order in Docket 18110, 50 FCC 2d 1046. The Judge's order denying Central the right to appeal his ruling was non-prejudicial since it permitted the adduction of *too much,* instead of too little, evidence.

203-204 *Denied.* The Judge accepted the Amendment with the proviso no comparative advantage would accrue to Cowles, and the subject matter of the amendment was not carried forward into the Initial Decision.

205-207 *Denied.* We find no error in our redesignation procedure allowing each applicant to amend its application as a matter of right, and Central fails to specify how any comparative advantage accrued to Cowles through their procedure.

208-215 *Denied.* The time frame governing material sought was reasonable. Moreover, par. 6 of the subject order accorded Central the right to specify the relevance of its particular time frame and to resubmit a new request specifying documents with greater precision.

216-220[1] *Denied.* The Judge did not err in ruling the proposed interrogatories went beyond the scope of the issues. An issue of the breadth encompassed by the interrogatories would not comply with the statutory requirement that hearing issues be specified with particularity.

220-222 *Denied.* The interlocutory ruling (see Exceptions 216-220) sought to be appealed was not fundamental, as confirmed by our own review herein.

223-231 *Denied.* Of no decisional significance insofar as engineering amendments are concerned in view of our disposition of the short-spacing waiver requests. As to non-engineering amendments, our Redesignation Order permitted amendments as a matter of right, a procedure fair to both applicants.

[427] 232-235 *Denied.* The Judge's ruling sought to be appealed did not involve possible error which might require a remand, as confirmed by our own review here, and our disposition of the mail fraud issue.

236-240 *Denied,* for the reasons stated in our Memorandum Opinion and Order (FCC 72-443, released May 25, 1972) disposing of various petitions seeking relief from the Redesignation Order and related pleadings involving then-pending matters.

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[1] Central lists two exceptions numbered 220. Our ruling here relates to the first exception so numbered.

241-243	*Denied.* None of the submissions by Cowles required the Review Board to specify an abuse of process issue against Cowles, as requested by Central.
244	*Denied.* See ruling on Exceptions 201-202.
245-249	*Denied.* Decisionally insignificant in view of the clear preference awarded Central on the diversification factor.
250	*Denied.* Error, if any, was harmless, and the incidents cited were beyond the designated issues.
251	*Denied.* The Chief Administrative Law Judge's refusal to provide for a hearing session in Des Moines, Iowa, was reasonable in light of the circumstances and well within his discretion.
252[2]	*Denied.* There is nothing unreasonable in a procedure according a potential witness a right to appeal a requirement that he testify at the hearing; the contrary would be unreasonable.
252-254	*Denied.* Of no decisional significance in view of the clear preference awarded Central under the diversification factor.

(C) *Central's exceptions to findings of fact and conclusions of law.*

255, 256, 258, 260, 263	*Denied.* Docket 13340 standards are not controlling here. See par. 45 of this decision.
257	*Granted,* in substance.
259, 261, 262	*Denied,* as decisionally insignificant in view of our denial of the short-spacing waiver requests.
265	*Denied* as argumentative. Moreover, the relevant finding is amply supported by substantial evidence.
266-268, 270-273	*Denied.* Of no decisional significance in view of our disposition of the "studio move" issue. All

[2]Central lists two exceptions numbered 252. Our ruling here is on the first exception so numbered.

of these exceptions are pitched in one way or another to a thesis which we have rejected, i.e., that the *de facto* move of the main studio from Holly Hill to Winter Park requires disqualification of Cowles. It does not, although it does warrant a comparative demerit.

269	*Granted.* The evidence warrants the proposed finding based on Brakefield's testimony. But this testimony (the sole testimony suggesting a deliberate corporate decision to concentrate on Orlando) was contradicted. See par. 84 of this decision. The Judge's conclusion on this point is thus supported by substantial evidence.
274, 287A	*Denied.* See discussion at par. 82, *supra.*
275-277E	*Denied.* The Judge's findings are amply supported by substantial evidence adduced under the "mail fraud" issue and reflect PDS activities. These exceptions are all directed to a thesis which we reject in our decision, i.e., that the PDS activities require disqualification of Cowles.
278	*Denied.* The fact the listed offers own no stock in Cowles is fully evident from the opening sentence of par. 116 of the I.D. The broadcast experience of these officers is fully apparent from the record. When they were elected to office is decisionally of no significance because Cowles was awarded no preference for integration of management and ownership. See par. 118, I.D.
[428] 279-283	*Denied.* The programs were within the license period.
284-286	*Denied.* The requested additional findings would not change our judgment respecting the excellence of Cowles' past record.
287	*Denied.* The record amply supports the finding WESH-TV broadcast a large number of public announcements in the license period.

288	*Denied.* See par. 143, I.D., wherein the Judge found Staed would assume full-time duties as General Manager, *but* only in Central's formative stages. Central has not excepted to this important time-limit on Staed's duties.
289-290, 321	*Denied.* The findings and conclusion excepted to are amply supported by Mrs. Goddard's own testimony, which indicated her duties were ill-defined and that she would not be integrated into management permanently. See particularly Tr. 1163, 1174, 1176, 1179-81, and 1186.
291	*Denied.* See Chambers' own testimony to the contrary, Tr. 2543.
292	*Granted,* except as to Chambers.
293-295	*Denied.* Insofar as these exceptions contend Docket 13440 standards apply, see pars. 44-45 of this decision. Beyond this, the record amply supports the conclusion there was no significant difference between the applicants' engineering proposals sufficient to justify a preference for either applicant. As to providing new service, see Exception 296.
296	*Denied.* As noted in our decision, we agree with the Judge that new service afforded under the proposals and the additional considerations advanced to support a waiver (pars. 158-159, I.D.) do not justify short-spacing waivers. See pars. 47-50 and fn. 14 of this decision.
264, 297	*Denied.* Of no decisional significance in view of the conclusion Central is financially qualified.
298-307, 311-313	*Denied,* as not of decisional significance in view of our conclusions on the "studio move" issue. The substance of all of these exceptions is dealt with at length in pars. 82 to 85 of this decision.
308-309, 310	*Denied,* except as indicated in this ruling. See pars. 97-102 of this decision, setting forth our basic agreement with the Judge's disposition of the "mail fraud" issue. See par. 103 of this decision for limitations we place on the conclusion a good past broadcast record immunizes a licensee from the effect of non-broadcast activities of related corporations.

314	*Granted.* See fn. 32, *supra.*
315	*Denied.* The Judge's analysis of how a renewal applicant and a new applicant with no broadcast record are to be compared is correct.
316-319	*Denied.* Not of decisional significance in view of the clear preference awarded Central under the diversification criterion. See further our discussion of this aspect of the proceeding in pars. 113-116 of this decision.
320-326	*Denied,* except as indicated in this ruling. See pars. 117-121 of this decision. Additional findings and conclusions respecting Dr. Schanck and Mr. Engram are made in this decision, and to this extent the exceptions are granted.
[429] 327	*Granted.* "Thoroughly acceptable" is too imprecise a term. See par. 137 of this decision.
328-330, 332-333	*Denied.* See pars. 118 *et seq.* of this decision, noting our agreement with the ultimate weighing of comparative criteria made by the Judge. Insofar as the exceptions reargue that Cowles must be disqualified because of the "studio move" and "mail fraud" issues, see pars. 74-84, and 86-103. To the extent the exceptions reargue the diversification factor, see pars. 114-116 of this decision.
331	*Granted.* We agree it was improper in the circumstances to award Cowles a "definite plus" for its auxiliary studios.

Rulings on Exceptions of Cowles and CCI to portions of the Initial Decision

Exception No.	*Rulings*
1	*Denied* as argumentative. Par. 10 of the I.D. correctly states the reduction in the existing orientation angle, but this reduction is not of the decisional significance claimed by Cowles, for reasons stated in our disposition of the short-spacing waiver requests. See par. 44-50 of this decision.
2	*Denied.* The present findings respecting the origin of the short-spacing between WESH-TV and WTHS-TV are adequate.
3	*Denied.* See pars. 45-50 of this decision.
4-5, 7	*Denied.* The proposed additional findings are for the most part irrelevant. WESH-TV's obligation to provide service to all its service area, the existence of its auxiliary Winter Park studios and Brevard County production facilities, and the fact its present transmitter site has long been in existence are not decisive of the short-spacing waiver requests. To the extent the proposed additional findings may be relevant, their substance is already reflected in the Initial Decision, albeit not in the words or form proposed by Cowles. See pars. 14-15, 21-22, and 62 of the Initial Decision. See also par. 48 and fn. 15 of this Decision.
6	*Denied.* See par. 49 of this decision.
8	*Denied,* except as indicated hereinafter. The present decision adequately notes how FAA restrictions limit site choice. *Granted,* to the extent indicated in par. 28 of this decision.
9	*Denied.* The FAA has not required anything. See also fn. 9 of this decision.
10	*Denied.* Insofar as the proposed finding is relevant, the decisionally significant facts appear in pars. 20-22 of the Initial Decision.

11-12, 15-20	*Denied.* See pars. 44 to 48 of this decision.
13	*Denied.* The Judge did not err in failing to make a speculative finding.
14	*Denied.* The alleged additional finding is actually a conclusion. In any event, the substance of this proposed conclusion is dealt with adequately in the Initial Decision and this decision, in connection with denial of the short-spacing waiver requests.
21, 41	*Denied.* See par. 51 of this decision.
[430] 22-24	*Denied.* See pars. 6-7 of this decision.
25-39	*Denied.* These exceptions involve alleged errors in the findings and conclusions under the "studio move" issue. We completely agree with the findings and conclusions of the Judge, which are based on substantial evidence on the record as a whole, and more accurately reflect the record than do the "softened" self-serving findings and conclusions proposed by Cowles.
40, 43	*Denied.* See par. 114 of this decision.
44-46	*Denied.* The relevant findings respecting the relation between CCI and the PDS subsidiaries is supported by substantial evidence on the record as a whole.
42	*Granted.* See par. 148 of this decision.
47-71	*Denied.* These exceptions either attack the Judge's findings under the "mail fraud" issue or propose different or additional findings. The Judge's findings under this issue are supported by substantial evidence on the record as a whole and more accurately reflect the record evidence under the "mail fraud" issue than do the softened and self-serving findings proposed by Cowles. In any event, in view of the Judge's ultimate conclusion that no decisional significance was to be attached to the portion of the record devoted to the mail fraud issue and our

own agreement with this conclusion, the exceptions here are not of decisional significance. See pars. 97-103 of this decision.

72 *Denied.* The conclusions excepted to are fully warranted by the findings under the mail fraud issue. In any event, the conclusions are not of decisional significance for reasons stated in connection with the ruling on Exceptions 44-71.

73, 75-82, 86 *Denied.* The Judge did not err in failing to make the conclusions requested in these exceptions, because these conclusions are not warranted by the record evidence as a whole. In any event, the conclusions are not decisionally significant for reasons stated in connection with the ruling on Exceptions 44-71.

74, 83-85 *Granted,* to the extent the exceptions indicate there was no involvement by the Cowles (the renewal applicant) in any of the PDS activities. See par. 102 of this decision. Denied in all other respects.

DISSENTING STATEMENT OF CHAIRMAN RICHARD E. WILEY

Re: Daytona Beach Comparative Proceeding

I would like to emphasize at the outset of this dissenting statement that I do not disagree with the majority's conclusion that it would be inequitable, and in many ways unfair, to remove Cowles' license on the basis of the record before us. With the exception of one or two minor incidents, this licensee has been faithful to its obligations under our rules and has provided solid (although in my opinion, not "superior") service to the community. This dissent is therefore based – not on my personal view of the equities involved – but rather upon a reluctant conviction that a grant of renewal would be inconsistent with the law as I understand it.

The Commission majority purports to base its decision in this matter on the traditional "comparative criteria" which were set forth in our *1965 Policy Statement on Broadcast Comparative Hearings,* 1 FCC 2d [431] 393 (1965).[1] This statement recognized that there are "two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." *Id.* at 394. While my own philosophy and values do not suggest that Cowles should lose its license, I cannot agree that it is possible to remain faithful to the Commission's announced comparative criteria and still grant Cowles a preference over its competitor.

Under the *1965 Policy Statement's* comparative elements of diversification of mass media control and "integration" of ownership and management, it seems to me that Central clearly is entitled to a preference on both counts. Moreover, as the majority concedes, Cowles should receive a demerit – in connection with the comparative criterion of best practicable service – for moving its main transmitter without prior Commission approval.

There remains but a single comparative element of decisional significance: the past programming service of the incumbent. Here, the Court of Appeals has told us that if an incumbent's record has been "superior," it is

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[1] The *1965 Policy Statement* was not originally intended to serve as a guide for comparative cases involving a renewal applicant. *Id.* at 393 n. 1. It was quickly established, however, that this *Statement* would govern the introduction of evidence in these proceedings. *Seven (7) League Productions, Inc.,* 1 FCC 2d 1597, 1598-99 (1965). Because the agency has never successfully established criteria especially designed for cases involving a renewal applicant-new applicant comparison, we have been left with little choice but to rely on the 1965 criteria in these cases.

entitled to a "plus of major significance." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971). In the present case, the Commission finds that Cowles' past service meets this test of superior performance and that, on this basis, it is entitled to a preference which is decisive as to the criterion of best practicable service. This preference, in turn, resolves the entire proceeding in the incumbent's favor. In contrast, the Administrative Law Judge found that Cowles' past service was "thoroughly acceptable," a term which clearly does not connote superiority. In the absence of some serious deficiency, I personally believe that thoroughly acceptable service to the community should warrant renewal. However, under current standards, it appears to be insufficient to offset Cowles' disadvantage under the other comparative criteria.

All of this brings me to a conclusion which I have stated before and which I sincerely believe: that the present comparative renewal process simply does not make sense and that a complete reform is urgently needed.[2] I personally cannot believe that the American public derives any benefit out of the existing process by which we attempt to apply objective criteria (for example, integration of ownership and management) to the largely subjective (and, in most cases, unanswerable) question of which applicant will provide the best future service. In

[2]This conclusion is hardly unique. Indeed, virtually everyone who has studied the problem has seen a glaring need for reform. See, e.g., R.A. Anthony, "Towards Simplicity and Rationality in Comparative Broadcast License Proceedings." 24 *Stan. L. Rev.* 1 (1971); W.K. Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission*, Administrative Conference of the U.S., September 1962; Friendly, "The Federal Administrative Agencies: The Need for a Better Definition of Standards," 75 *Harv. L. Rev.* 1055 (1962).

my judgment, it is time for the Commission and other branches of government to work together to bring rationality and order out of the existing chaos. In this regard, I believe that the comparative evalu-[432]ation of a renewal applicant and a challenger should be eliminated and that all incumbents who do a good and faithful job of serving their communities should be renewed. In a non-comparative evaluation, Cowles clearly would have every right to anticipate renewal. As I see it, that should be enough to settle the matter.

My concern over our continued reliance on the *1965 Policy Statement* is not, by any means, limited to the difficulties which exist in this particular case. It is clear to me that this agency's emphasis on diversification of media control and on the participation of owners in station management carries with it a considerable danger of restructuring ownership patterns through the comparative renewal process. Group owners, as a class, tend to have a built-in, and unwarranted, disadvantage with respect to both of these elements. Many of their stations are operated by a semi-autonomous local management and, by definition, these owners possess a number of other media interests. In contrast, it is a relatively simple matter to put together a challenging group with no outside media interests and with a proposal to substantially integrate the owners into the management of the station. In a very real sense, therefore, the group owner begins our comparative proceeding with two strikes against him – as was true in this case.

While the 1965 criteria (including diversification and integration) originally were a creation of this Commission, it is not clear that we have a completely free hand in modifying these standards. The Court of Appeals has stated that "the Commission simply cannot make a valid

public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it." *Citizens Communications Center v. FCC, supra* at 1213 n. 36. In the light of this statement, the Commission itself has concluded that "whatever policy is developed [in the future] will take into account diversification as a factor that must be considered in a comparative renewal hearing." *Second Report and Order on Multiple Ownership* (Docket No. 18110), 50 FCC 2d 1046, 1088, *reconsideration*, 53 FCC 2d 589 (1975). Thus, while the Commission has no interest in using the renewal process to restructure the industry, it has felt compelled to follow a comparative evaluation policy which points in that direction. This is true even though the agency has indicated that the degree of restructuring which it deems to be necessary has been already accomplished through rulemakings. See *Second Report and Order on Multiple Ownership, supra* at 1088. And, unlike our comparative proceedings, a divestiture ordered through rulemaking at least has the virtue of allowing the group owner (who, in most cases, has been a faithful public trustee) to recoup a portion of his investment through sale of the station to a new licensee.

Even under the element of "best practicable service," there is little reason to believe that our existing criteria are furthering a realistic public interest purpose. When we consider, for example, the element of participation of owners in station management, "integration," it is evident that the Commission majority has no firm commitment to the idea, expressed in the *1965 Policy Statement*, that an "integrated" management is inherently preferable to one which is operated on a [433] semi-autonomous and professional basis. There is no *a priori* basis for such a preference; indeed, one might well

assume that professional managers are typically selected on the basis of their experience and abilities whereas the owner-manager may achieve his status as result of wealth and other circumstances not directly related to the capacity to effectively manage a broadcast station. I am certain, furthermore, that there is no empirical evidence to support the preference set forth in the *Policy Statement*.

It is easy enough to state the problem: that the 1965 standards concerning diversification and integration advance no public purpose to which the agency is truly committed and, if implemented in a rigorous fashion, could well have a serious destabilizing effect on the broadcast industry to the detriment of the listening and viewing public. It is considerably more difficult, however, to set out a solution. While I believe that we administratively could eliminate the element of integration, it is highly questionable – with regard to the diversification criterion – that the courts would permit an abandonment of present policy without some statutory change.

In 1965, we made an effort to set forth reasonably objective factors to be considered in evaluating which applicant, among a number of competitors, would likely provide the best future service to the community. I believe, however, that no such criteria can possibly serve as a reliable guide to predicting human behavior. For example, former Chairman Hyde has stated:

> [T]he automatic preference accorded local applicants disregards the possibility that, depending on the facts of a particular case, a competitor's proposed use of a professional employee-manager from outside the community might very well bring imagination, an appreciation of the role of journalism, and sensitivity to social issues far exceeding that of a particular local owner-manager.

Hyde, "FCC Policies and Procedures Relating to Hearings on Broadcast Applications," 1975 *Duke L.J.* 253, 277 (1975). But intangibles such as "imagination" and "sensitivity" are not subject to objective evaluation or measurement and I, for one, question the wisdom of allowing an administrative agency to even attempt the task. Thus, we are left with a situation in which objective criteria are unreliable (and really useless) in predicting future behavior, and subjective criteria – while clearly relevant – are not susceptible to administrative evaluation.

In the final analysis, I must conclude that there really is no sensible basis by which applicants who are similarly qualified can be compared – and this is particularly true where the comparison called for is between a renewal applicant and a challenger with no past record of broadcast service. The process inevitably leads to complex hearings which drag on for years at great expense to all concerned. And, ultimately, we are left with a final decision which, at its best, can only rest on administrative hunch or intuition. In my opinion, this process simply does not serve the public interest. Accordingly, I am hopeful that the Commission and the Congress will recognize the need for prompt and effective legislative reform.

I dissent, in this case not so much to Cowles' renewal – which I think could be justified under a rational renewal policy – but to the process by which I feel compelled to oppose it.

[434] DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Cowles Florida Broadcasting, Inc. *et al.*
(Docket Nos. 19168, 19169, 19170)

This is one of those cases. But for the challenge of a highly qualified competing applicant, it is unlikely that the WESH license would have been in serious jeopardy, irrespective of its deficiencies. However, in the law, "but for" are two very pivotal words of substantive import and a lot of litigants have found themselves on the unhappy side of "but for."

There is no doubt that comparing an incumbent licensee with a new competitor presents one of the more difficult analytical challenges faced by this Commission. Yet, given the fact that the spectrum is limited and that occupancy is not guaranteed in perpetuity, the law requires that each party seeking the license privilege for the same spectral slot be accorded equality in its quest. Hence, as stated in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) and more recently in *Citizens Communications Center v. FCC*, 447 F.2d 1201, (D.C. Cir. 1971), the Communications Act demands a fair, comparative hearing between or amongst the applicants. There is no gainsaying the law in this regard.

My colleagues in dissent in this case, however, suggest that we somehow abandon the comparative hearing process as altogether unworkable. But, I assert that the result reached by the majority in this case is *not* a result of the application of the criteria set forth in the *1965 Policy Statement;*[1] the result is due to *failure* to equitably apply the standards in the *Policy*.

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[1] ***Policy Statement on Comparative Broadcast Hearings***, 1 FCC 2d 393. (1965).

The majority, by some phantom computer, allegedly takes all of the comparative atttibutes of the new applicant, adds in the proper merit based on minority ownership,[2] subtracts some demerits from the incumbent for various offenses and, *presto*, calculates these unweighted pluses and minuses to come down on the side of the incumbent. The majority simply does not accord the new applicant the credit it is entitled to under virtually each of the six principal elements of the *Policy*.[3]

Thus, the fault in this case clearly lies not with our comparative standards, imperfect as they may be; the fault is that the majority – to reach its desired result – distorts the *Policy* almost beyond recognition. It seems to me illogical, then, to inveigh against a *Policy* which was all but ignored.

I want to clearly declare that I am receptive to *any* suggestion for improving our comparative process. I understand that we have been working on revising our standards for some time and plan to address the matter in the near future. Until such improvements are made, though, we cannot merely toss the *Policy* out; we are bound to apply that *Policy* with earnest zeal.

From our failure to do so, I must dissent.

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[2] *See TV 9 Inc.* v. *FCC*, 495 F.2d 921 (D.C. Cir. 1973), *cert. denied* 419 U.S. 986 (1974); *Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

[3] The six principal elements are: (1) Diversification of control of the media (considered the most important); (2) full-time participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient frequency use; and (6) character. *Policy Statement*, n. 1 above.

[435]

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

Introduction

Despite the legal theory of the Communications Act that a license is not a property right,[1] the practical reality has been quite different, as all the world knows. Licenses are readily transferable and have substantial market value beyond the value of the transferred assets. That market value rests, of course, on an expectation that renewal is assured, at least unless the licensee has seriously misbehaved. This practical reality was virtually undisturbed until 1969 when the Commission took the altogether remarkable step of denying a renewal applicant in favor of a competing applicant. *WHDH, Inc.* 16 FCC 2d 1 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 811 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The history of comparative challenges since the *WHDH* case is one of confusion,[2] in part reflecting uncertainty as to just what the Commission held in *WHDH*. While an extended review of this history is unnecessary, a brief recital of the major events may help to add perspective to this case.

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[1] See 47 U.S.C. Section 309(h); see also Sections 301, 304, 307(d).

[2] For detailed review of the history of comparative contests at renewal, see Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 Va. L. Rev. 471 (1975.)

WHDH and After: How We Got Here from There

The best place to begin is with the *WHDH* case inasmuch as this is the wellspring from which most of these troubled waters have flowed.[3] In 1957, after a long comparative hearing among four applicants, the Commission granted a permit to WHDH, Inc., to operate on Channel 5 in Boston. On appeal, when it was discovered that the Commission's award might have been tainted by *ex parte* contacts by one of WHDH's principals, the Court remanded to the Commission for an evidentiary hearing into the nature of those contacts. After a special hearing, the Commission, while refusing to disqualify WHDH, decided that the permit should be set aside and the entire proceeding be reopened. It did, however, permit WHDH to continue broadcasting by granting a special temporary authorization for a period of four months. After further comparative hearings (this time among three of the four original applicants), the Commission again awarded a permit to WHDH. However, it made a grant to WHDH for only four months on the grounds that the improper approaches on behalf of WHDH to the chairman required a new look at the applicant at renewal time. In 1963 when WHDH filed for renewal, three competitive applications were filed (the Commission virtually invited comparative hearings by holding open the period for filing).[4]

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[3] On *WHDH* generally, see, *e.g.*, Jaffe, *The FCC and Broadcasting License Renewals*, 82 Harv. L. Rev. 1693 (1969); Goldin, *"Spare the Golden Goose" – The Aftermath of WHDH in FCC License Renewal Policy*, 83 Harv. L. Rev. 1014 (1969).

[4] Meanwhile the original four-month grant had been appealed both by WHDH and by one of the losing applicants in the original case. While the appeal was pending the leading principal of WHDH (who had been implicated in the *ex parte* activities) died.

[footnote continued]

In the new comparative hearing, the hearing examiner purported to apply the criteria set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 [436] (1965), but nevertheless placed primary emphasis on the operating record of WHDH and on this basis renewed WHDH's license, in accordance with the policy established in *Hearst Radio, Inc. (WBAL)*, 15 FCC 1149 (1951), of favoring incumbent licensees. The Commission, 3 to 1, reversed the examiner, denied the application of WHDH and granted that of a competing applicant, Boston Broadcasters.[5]

The Court again remanded the case to the Commission to determine the effect of this death on the proceeding, and it authorized the Commission to combine the renewal proceedings with the proceedings on remand for reconsideration of the award of the four-month license, both to be conducted on a comparative basis.

[5] The crucial issues which are relevant here were the questions of the applicability of the Commission's 1965 Policy Statement on Comparative Broadcast Hearings and the weight to be given WHDH's past broadcast record. While the Commission in its 1965 Policy Statement indicated that it was not applicable to contests between a new applicant and a renewal applicant, it subsequently held that the Policy Statement should govern the introduction of evidence in proceedings where renewal application was contested, even though it reserved the question whether, and to what extent, the weights to be accorded to the various factors (in particular the weight to be given the past broadcast record of renewal applicants) should be the same as indicated in the Policy Statement. See *Seven (7) Leagues Productions, Inc.*, 1 FCC 2d 1597 (1965). The Commission in its original opinion in *WHDH* affirmed the applicability of the 1965 Policy Statement. The Commission reversed the examiner's heavy reliance on WHDH's operating record and in doing so appeared to overrule the old *Hearst Radio* case. Thus, while the Commission acknowledged that a past record of an applicant was relevant, this record was not allowed to enter into the comparative evaluation because it did not "demonstrate unusual attention to the public's needs or interests." Once WHDH's past broadcast record was ruled out of the case and it was determined that WHDH stood on essentially the same footing as

[footnote continued]

On reconsideration the Commission adhered to the Order, and on appeal the Court of Appeals affirmed. While the original opinion in *WHDH* gave little hint that this was to be considered an exceptional case, on reconsideration the Commission, apparently reacting to the alarm of the industry at what appeared to be an opening up of all existing licensees to comparative contest at renewal, made an effort to distinguish *WHDH* from the normal case. At the end of its opinion on reconsideration, 17 FCC 2d 856, 872-73, the Commission noted:

> "In closing, we think it should be made clear that our decision herein differs in s nificant respects from the ordinary situation of ne . applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of four months only because of the Commission's concern with the '. . . inroads made by WHDH upon the rules governing fair and orderly adjudication. . . .' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for Channel 5

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the other applicants, the results were foreordained. WHDH's ownership by the Herald Traveler resulted in a demerit on the very important diversification criterion. WHDH was also found inferior on grounds of integration of ownership and management. There was also entered a demerit against WHDH because of its failure to obtain approval prior to transfer of *de facto* control.

> would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license."

On appeal the Court took special note of this language in the reconsideration opinion in sustaining the Commission's apparent departure from *Hearst* and its interference with "legitimate renewal expectancies implicit in the structure of the Act." 444 F.2d at 854.

Despite the effort in the reconsideration opinion to treat *WHDH* as an exceptional case, industry reaction continued to be strongly negative. As a result, legislation was introduced which would have required a two-step procedure in renewals: first, the Commission would consider the incumbent's request for renewal; and, if and when it found the past record of a licensee inadequate in terms of the "public interest [437] standard," it would go to the second stage and receive competing applications. The proposed legislation died (though its spirit was revived in subsequent bills which almost passed the 93rd Congress and in proposed legislation currently pending) when the FCC came forward with its own "solution," *Policy Statement Concerning Comparative Hearings Involving Regular Applicants* 22 FCC 2d 424 (1970). In its 1970 Policy Statement the Commission similarly sought to protect incumbent licensees against a rash of challenges from new applicants. The 1970 Policy Statement provided that in case of a comparative challenge to a renewal applicant, the renewal applicant would be preferred over a newcomer whenever his program service during the preceding term had been "substantially attuned to meeting the needs and interests of its area," and

the operation of the station had not "otherwise been characterized by serious deficiencies." The Commission stressed that the words "substantially attuned" meant something more than "minimal" service. While the FCC's Policy Statement left to the hearing process the task of defining "substantial service," in 1971 the Commission instituted an inquiry to explore the possibility of establishing guidelines defining "substantial service." In particular, it proposed some general guidelines for quantitative superiority in two areas, local programming and news/public affairs programming. *Formulation of Policies Relating to the Broadcast Renewal Applicant,* 27 FCC 2d 580 (1971). That inquiry is still outstanding.

Shortly thereafter the Court in *Citizens Communications Center v. FCC,* 447 F.2d 1201 (D.C. Cir. 1971), held the 1970 Policy Statement to be invalid as a violation of Section 309(e) of the Act and the *Ashbacker* rule which (the Court held) required a full hearing in which all parties could compete on all criteria relevant to the grant of a license. However, the Court did not preclude the Commission from giving significant weight to the past broadcast performance of an incumbent licensee; it specifically recognized that *"superior"* performance should be a "plus" of major significance in renewal proceedings. Thus, despite the Court's insistence on a "full hearing" in which all parties stand on the same procedural footing, the Court in effect ratified the Commission's determination that an incumbent could be preferred (could "reasonably expect renewal") on the basis of its past broadcast record alone. Thus, the only point of major difference between the Court and the Commission appears to be the standard for determining when that past broadcast record is sufficient to support that expectation of renewal.[6]

[6] See Geller, *supra,* 61 Va. L. Rev. at 487.

Even as to this there is a substantial doubt as to the significance of the difference between the Court's standard and that of the Commission. Following the Court's decision the Commission issued a *Further Notice of Inquiry,* 31 FCC 2d 443 (1971), in which it attempted to clarify its earlier Notice by emphasizing that its concept of "substantial performance" meant something more than "minimal performance." However, it refused to embrace the Court's standard of superior service, inasmuch as that suggested some kind of comparative standard which could be self-defeating if everyone improved its performance. The Citizens Communications Center, believing the Commission's statement to be at odds with the Court's holding in 1971, petitioned the [438] Court to clarify its mandate and to direct the Commission to follow the "superior service" standard. The Court did reiterate its commitment to the concept of a superior service but refused to direct the Commission to do anything further than it had already done in initiating the Inquiry. See *Citizens Communications Center v. FCC,* 463 F.2d 822 (D.C. Cir. 1972).

Since that time the Commission has issued still further notices of inquiry into the formulation of guidelines for renewal, 43 FCC 2d 367, 1043 (1973) while Congress has debated further legislation to enact the essential substance of the Commission's 1970 Policy Statement.[7] However, in view of *Fidelity Television, Inc. v. FCC,* 515 F.2d 684 (D.C. Cir.), *cert. denied,* 423 U.S. 926 (1975), it is doubtful that the Commission's Inquiry or Congress'

[7] Proposed legislation which would have substantially accomplished this passed both House and Senate in the 93d Congress, only to die when no conference committee was convened. See *Broadcasting,* Dec. 16, 1974, pp. 19-20. Similar legislation is currently pending in the 94th Congress.

proposed legislation will have any practical significance. If there was any fear of the Commission's determination to treat *WHDH* as a stroke-of-lightning-once-in-a-lifetime event, *Fidelity* would have allayed it.[8] By any fair assessment, the incumbent in *Fidelity*, RKO, was a "poor contender," as the Court conceded in affirming the Commission's renewal of its license, 515 F.2d at 702. In terms of its past performance, the incumbent was adjudged only "average"—well below the "substantial" performance needed to earn a "plus of major significance," and indeed insufficient to earn a plus of any significance, 44 FCC 2d at 133.[9] Nor did the incumbent demonstrate any evident superiority over the challenger in respect to any other comparative criterion. While the challenger (Fidelity) made a similarly unimpressive impact on the Hearing Examiner (who nevertheless preferred it over the incumbent), on the Commision and on the Court, it did offer what any objective observer would concede to be a comparative advantage on what the Commission had in *WHDH* treated as an important comparative criterion, diversification of media interests. Overlooking that comparative advantage was not easy, but the Commission was

[8]The Commission's decision in *Fidelity* was foreshadowed by *Moline Television Corp.*, 31 FCC 2d 263 (1971) where the Commission, 4-2, overlooked a serious promise-versus-performance issue (the promises being those which helped the incumbent to prevail over competing applicants in obtaining the license in the first place) in order to find the inbumbent's past record "superior." However, much as the Commission may have strained to renew the incumbent's license in *Moline*, it was nothing compared to the effort in *Fidelity* where the incumbent won despite the fact that even the Commission would not characterize the incumbent's record as "superior" – or even "substantial."

[9]To the Examiner in *Fidelity*, even the term "average" magnified the quality of the incumbent's performance. See 44 FCC 2d at 219-21.

equal to the task. Pointing to the other competing media in the Los Angeles market, and noting also that the challenger also had some other media interests (trivial in comparison to those of the incumbent RKO) the Commission concluded that there was no basis for preferring the challenger on this count, *id*, at 133-34.

All in all, *Fidelity* was a *tour de force*, accomplishing even more than the Commission had purported to accomplish with its ill-fated 1970 Policy Statement. In 1970 the Commission merely purported to guarantee renewal to an incumbent which demonstrated "substantial" service. In *Fidelity* it managed to grant renewal to an incumbent who demonstrated "average service," who was actually the weaker candidate on one major comparative criterion, and not materially better on the others (integration and local ownership). In the end it is hard to [439] disagree with Judge Bazelon's caustic assessment of the Commission's opinion as little more than a disingenuous masquerade for a predetermined vote in favor of the incumbent, 515 F.2d at 726, but it was the Court's affirmance as much as the Commission's decision which prepared the stage for the decision in the present case, which should set to final rest any lingering fears that the Commission intends to use the comparative process to dislodge incombent licensees. Barring misbehavior serious enough to disqualify regardless of the comparative contest, a licensee may expect renewal in due course.[10]

[10]Of course, as noted below, the licensee still has legitimate reason to fear the large expense of going through this ritualistic process.

The Art of One-Upsmanship:
How to Succeed in a Regulated Business
Without Really Trying

To the perceptive observer of the history of renewal contests, it will doubtless be apparent by now that there is less to such "contests" than meets the eye, that in fact it is not a real contest between two applicants but a pretend game played between the Commission and the public. The outcome of the game is predetermined; the art (and the sport) is to maintain interest until the inevitable outcome is registered. The Commission's role is to look judicious in pursuing a process that yields only one result; for the public the fun is watching the show and trying to anticipate how the Commission will finesse the result in the particular case. It rather resembles a professional wrestling match in which the contestants' grappling, throwing, thumping—with attendant grunts and groans—are mere dramatic conventions having little impact on the final result. Of course, wrestling fans know the result is fixed and generally in whose favor; still they fill the bleachers to see how it is done. So it is in the present case.

The Commission begins by examing certain "engineering issues" dealing with minimum mileage separation requirements. Both applicants proposed transmitter sites (Cowles proposes to change its present site) that entail mileage short-spacings, and thus require waivers of our mileage separations rules. Although these issues receive considerable attention in the Commission's opinion, they are actually irrelevant to the comparative choice between the two applicants. Like the ALJ, the Commissin finds neither waiver is warranted; it also apparently agrees with the ALJ that

there is no basis for a preference to either applicant on this issue.

The next issue is the main studio issue—whether Cowles moved its main studio unlawfully and, if so, whether it should be disqualified on that account. The ALJ found that there had been a transfer of the main studio without prior Commission authorization, but he excused it on the ground that Cowles' service had not been hurt by it. The Commission agrees. Even accepting the correctness of the Commisison's findings here, it should be stressed *that this is simply the lack of a decisively negative finding against Cowles, not an affirmative finding in its favor.* Indeed, as the Commission concedes, the *de facto* transfer is a comparative demerit.

Potentially more serious than the studio move is the involvement of Cowles' parent corporation in mail fraud. The ALJ found sufficient evidence of fraud but, as with the studio move, felt it was not disqualifying [440] since it did not implicate Cowles' broadcast operations. The Commission agrees with the result, though on a slightly modified ground—essentially a belief that the sins of the fathers should not be visited on the heads of their offspring. Indeed, the Commission goes so far as to find no warrant even for assessing a comparative demerit against Cowles for the actions of its parent. However, lest it be thought to be encouraging misbehavior, the Commission does issue a stern warning that "our affirmance of the Judge does not render unlawful conduct of an applicant in non-broadcast activities irrelevant." It further intimates that inquiry into the fraud issue at the hearing was proper even though it related only to the non-broadcast activities of a parent operation. In short the Commission wants it clearly known that it does not countenance fraud even if it does not propose to do anything about it

unless the licensee or its principals are directly involved in it.[11]

This brings us to the comparative issue, the central part of the case. Up to this point the contest is in equipoise with neither applicant having an edge over the other, except to the extent that Cowles has some kind of demerit for the unauthorized relocation of its main studio. The key comparative issues are: (1) diversification of media interests; (2) integration of management and ownership; (3) minority involvement,[12] and (4) best practicable service. In addition, there is the studio location issue, noted earlier, which the Commission treats as a matter for comparative evaluation even if not a basis for disqualification.

With respect to diversification there is no doubt that Central is superior to Cowles; the only question is the weight to be assigned that superiority. The Commission joins the ALJ in Central's contention that this superiority is decisive, but having decided the obvious, the Commission fails to explain just what the significance of Central's merit is.

The Commission's treatment of the applicants' integration proposals is shot-through with confusion. Cowles has no integration of ownership and management and all; Central, by contrast, proposes a modest degree of ownership participation in management, an integration plan

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[11] Compare *Western Communications, Inc. (KORK-TV)*, FCC 2d (1976), disqualifying an incumbent which had itself engaged in fraudulent practices ("fraudulent billing").

[12] Although the Commission treats this as essentially a part of the integration issue, I think it is legally a separate issue which, whatever decisional weight is given to it, should not be wholly submerged in the integration issue. See *Garrett Broadcasting Service* v. *FCC*, 513 F. 2d 1056 (D.C. Cir. 1975); *TV 9 Inc.* v. *FCC*, 495 F .2d 929 (D.C. Cir. 1973), *cert. denied* 419 U.S. 986 (1974).

which the Commission concedes "is somewhat stronger than that of Cowles." But what the Commission makes of this finding is not entirely clear, for it goes on to find that while Central's proposal "warrants a 'merit,' . . . we do not think that merit is sufficiently substantial to justify a preference." What weight, then, is this merit to be given? As with diversification, all we know is that however much weight it is accorded, it is not enough to carry the day for Central.

The same vagueness characterizes the Commission's disposition of the minority ownership question. The Commission concedes that Central is entitled to an edge over Cowles because of the involvement of two Black stockholders, one of whom is an officer and a director of Central. But what weight is to be given to this "plus"? After a scholastic discussion of the fine distinctions between "merit" and "preference" [441] that would do honor to Thomas Aquinas,[13] the Commission concludes, once again, that whatever the weight to be given Central's superiority on this score, it is not enough.

At this point, it must occur to the curious to ask, "enough" for what? So far Central has prevailed on three standard comparative issues and has also received some kind of advantage for not having violated the law — Cowles having done so by moving a main studio without prior authorization. Even granting that Central's superiority is not overwhelming on any of these counts, the fact remains, *Cowles at this point has nothing.* Whether one calls the points "preferences," "merits," "plusses" or gumdrops, the score is still 4 to 0 in Central's favor as we

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[13] In fairness to the Commission, it must be noted that the Commission's semantic disquisition is, at least in part, the product of the Court's gloss of those terms in the *Garrett* and *TV 9* cases, *supra.*

enter the last stage of the game – wherein we address the question of best practicable service.

On the best practicable service criterion the ALJ awarded Cowles a "definite plus" for its auxiliary studios serving the Orlando area and a plus of some kind for Cowles' "thoroughly acceptable" record, which he evidently thought promised more for the future than Central's paper promises. The Commission, finding the first plus at odds with the demerit assessed against Cowles for moving its main studio to Orlando, overrules this finding and reverses the ALJ's characterization of Cowles' record as merely "thoroughly acceptable." Reexamining the record for itself the Commission finds it is "superior." On the strength of this last finding Cowles wins.

Those who have a head for numbers but not for this peculiar game may be baffled to explain Cowles' victory. Down by a score of 4 to 0 Cowles comes forth at the last minute, scores once, and wins. But, of course, the score is meaningless unless you understand how the game is played. According to the rules, reviewed earlier, where the game involves a contest between a renewal applicant and a "newcomer," if the renewal applicant has a "superior" record of past performance – which is to be distinguished from one that is merely "thoroughly acceptable" – it receives a "plus of major significance." See *Citizens Communications Center, supra.* Although the rules do not state what weight is to be given a plus of major significance (or what constitutes "superior" service), the Commission's decision indicates that the weight can be expected to be greater than any number of mere "plusses," "merits," "preferences," or gumdrops which any challenger can earn. In short, if the incumbent scores "superior" on past performance, the game is his.

At this point one might think it important to know what constitutes "superior performance."[14] The answer I derive from the Commission's opinion is that "superior" means whatever the licensee has done, providing the licensee itself has not seriously misbehaved. Cowles' record of positive achievements must not have seemed overwhelming even to the Commission majority, who had to conduct a special search of the record to find evidence of Cowles' "superior" performance. This evidently is the Commission's version of the Court of Appeals' "hard [442] look" requirement:[15] it looks hard until it finds what it is after. Having found it, the Commission then seeks to invest it with the aura of administrative expertise by announcing that, ultimately, it is a matter of "administrative feel acquired through years of overseeing television operation." It is a fitting capstone to this game that, after an elaborate hearing process, a fine combing of the applicant's respective merits and a long deliberation on the weights to be accorded thereto, the Commission declares that picking the winner is a matter of "administrative feel." One thinks of sitting at the feet of a great Zen master waiting to hear the secrets of life and all that comes forth is an inscrutable koan.[16]

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[14] As it turns out, however, this is not really important, for as was demonstrated in the *Fidelity Television* case, *supra*, even an "average performance" can be made to support a victory for the incumbent.

[15] See, *e.g.*, *WAIT Radio* v. *FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Greater Boston Television Corp.*, *supra*, 444 F.2d at 851.

[16] Sample: A monk asked a Zen master: "All things are reducible to the One; but where is the One reducible?" Replied the master, "When I was in the district of Ch'ing I had a robe made that weighed seven chin." D.T. Suzuki, *Zen Buddhism*, 152 (1956). In fairness to Zen it should be pointed out that the true koan, how-

[footnote continued]

I do not say that the result in this case could not be justified by a rational policy. I only say that it cannot be justified by the policy which the Commission purports to follow.[17] And the process has nothing whatsoever to do with the outcome. Something has to be changed.

Regulatory Reform: Adjusting to Reality

Something has to be changed.

One place to begin is with a legal recognition of the reality: a licensee has a property right in its license which is defeasible only for serious misbehavior. I recognize, of course, that the Act provides that the licensee has no vested property interest. But, as I said at the outset, the statutory theory has been nullified by immemorial practice. Moreover, notwithstanding the *Citizens Communications* case, this practical reality has been judicially affirmed. See *Fidelity Television Inc. v. FCC, supra.*[18]

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ever inscrutable intellectually, is nevertheless designed to produce enlightenment – startling the mind into intuitive truth. The Commission's koan by contrast has the opposite mission: to numb the mind and obscure what is going on.

[17]The Commission purports to reward "superior" performance and thereby to maintain incentives for high performances. Unless Cowles' performance is judged superior, the Commission says, other incumbents "will be tempted to lapse into mediocre performance." As Winston Churchill once remarked, "I should not have thought it possible to have stated the opposite of the truth with greater preciseness." In fact, by treating an ordinary (if "thoroughly acceptable") performance as superior, the Commission signals all licensees that their licenses are safe from challengers, at least so long as they do not egregiously misbehave. Whether or not that might be a reasonable policy to pursue, *it is not the policy which the Commission purports to follow.*

[18]*Cf. Greater Boston Television Corp., supra,* 444 F.2d at 854 where the Court noted that had the Commission's action in refusing to renew WHDH's license not been exceptional, it would have raised a question whether it "unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act."

If, however, the Commission believes that the Act binds it to pursuing this present process of comparative evaluation, then it ought to seek legislative or judicial amendment. Failing such amendment, it should pursue the theory of the Act to its logical terminus: all applicants should be treated alike. Of course, we would still be stuck with a comparative process that experience has shown to be arbitrary and inefficient, but we would at least be free of the added complication of jiggering the process in order to find "superior" performance, in order to give a "plus of major significance," in order to justify a predetermined grant to the incumbent licensee.

[443] I recognize that this latter course might produce chaos (and it would certainly produce panic) in an industry so accustomed to stability. I have no desire to produce such results, but I see no other way of faithfully adhering to the theory that licenses confer no property right and no guarantee of renewal. The alternative – and I think far more sensible – course would be to adhere to the result obtained here, but abandon the comparative hearing process and the legal theory it purports to serve. This approach would simply accord legal recognition to the reality that licenses do confer property rights. Such a recognition would not, of course, mean that the rights are absolute: as is true of all property rights the license right would be burdened with certain obligations (the general public service obligations imposed on licensees); and they would be defeasible upon a showing that the licensee has seriously abused his rights – for example, by using them to perpetrate a crime.

Legal recognition of vested property rights, and abandonment of the comparative renewal process, also necessarily calls into question some of the underlying premises on which licenses are awarded in the first place. Inas-

much as I have already strayed beyond this case so far as to raise the question of renewal reform, a few further observations on the more general problem of licensing can do no harm.

The Commission's licensing process has been the subject of criticism since its earliest days. The criticism has ranged broadly over all aspects of the procedures employed to the criteria used in licensing broadcast applicants. But of all aspects of broadcast licensure that have been singled out for criticism, none has been more frequently, more trenchantly and more persuasively criticized than the process of choosing among competing applicants – the FCC's equivalent of the Medieval trial by ordeal. For a succinct summary of the problem, Commissioner Lee's description of the process can scarcely be improved upon:

> "Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a tortuous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense – but comes the oral argument and all of the losers concentrate their fire on the 'potential' winner and the Commission must thereupon examine the claims and counterclaims, 'weigh' the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 percent of the cases. The real blow, however, comes later when the applicant that emerged as the winner on the basis of our 'decisive' criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a 'hell of a way to run a railroad. . . .' "

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 404, 405-06 (1975). Commissioner Lee is correct: this is a hell of a way to run a railroad. But is it the only way?

So long as the Commission must adhere to the ritual of comparing the respective "merits" of applicants, I see no hope for meaningful reform of the licensing process. There are, of course, contrary views [444] even among those who concede the process requires improvement.[19] I myself once thought the process could be improved short of a total overhaul,[20] but I know better now. A few marginal improvements could be made in the procedures and the criteria for choosing among competing applicants, but they would not significantly improve the overall process or the results. For the most part, the quality of the proposals we look at is meaningful only in terms of thresholds. An applicant's engineering proposal will be either sound or unsound. The technical and business people an applicant intends to manage the station will be either acceptable or unacceptable. The ascertain-

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[19] See Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 Stan. L. Rev. 1 (1971), proposing a rather elaborate system of comparative evaluation based on fixed points awarded to each applicant under each policy criterion, ranked according to importance.

[20] *Radio Spectrum Regulation: The Administrative Process and the Problem of Institutional Reform*, 53 Minn. L. Rev. 1179, 1260-61 (1969).

ment of community problems, needs and interests will be either adequate or inadequate. Programming proposals should not be combed minutely, if indeed they should be examined at all, for obvious First Amendment-related reasons. Certainly if they surpass some minimum level of acceptability, nothing further should be required. To go beyond an inspection of basic qualifications is productive of nothing but senseless waste of resources—those of the applicants and our own. And yet confining ourselves to basic matters which may[21] have some meaningful effect on performance almost invariably proves insufficient for making the choice. Particularly where only paper records are involved, it is unlikely that many who survive the initial staff scrutiny which precedes the hearing will be ruled out on the strength of a basic deficiency. And it is even more unlikely that all applicants but one will be eliminated by this process.[22]

If there are no meaningful distinctions between applicants, then the choice between them will be, perforce, arbitrary. Arbitrariness *per se* is not necessarily a bad

[21] I say "may" advisedly. I pass over the question of probable implementation which is an additional problem. It should, however, be mentioned that by introducing this element into consideration the present comparative system tends to create a "Catch 22": applicants are induced to compete on the basis of promises, but if an applicant gets carried away with its promises it may find them being discounted on the ground that they are unlikely to be effectuated. See 1965 *Policy Statement, supra,* 1 FCC 2d at 398; *Fidelity Television, Inc., supra,* 515 F .2d at 700-701

[22] It is, admittedly, not impossible. See *Goodson-Todman Broadcasting, Inc.,* 45 FCC 2d 573 (1973) where the Commission, relying on Section 307(b) of the Act, disqualified all comparative applicants but one on the strength of purely technical considerations without reaching the standard comparative issue. It is noteworthy, however, that the Court remanded *Goodson* for further justification for bypassing of a full comparative hearing. *Pasadena Broadcasting Co.* v. *FCC,* F.2d No. 75-1002 (D.C. Cir. 1975).

thing: government does hundreds of things arbitrarily, like deciding which tax returns are to be audited. But if a government agency is required to make an essentially arbitrary choice, it is important that the arbitrariness equates to randomness rather than personal whim. The wheel of fortune—a lottery—is much to be preferred to that different class of arbitrary criteria, the capricious preferences of bureaucrats. As Judge Leventhal said in dissenting to an affirmance of an FCC comparative hearing award in *Star Television Inc. v. FCC,* F.2d 1086, 1089, 1094-95 (D.C. Cir.), *cert. denied,* 396 U.S. 888 (1969).

> "I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for [445] a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to 'demerits' in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes concerning intuition that outruns analysis. The possibility that an agency may come to the point of resting on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise. I for one would be prepared to sustain an action presented with such candor, but pause in saying that, to note

that such a candid disclaimer would perhaps crystallize other and more acceptable solutions. Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the opportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmissable means of deciding the undecidable, provided the ground rules are known in advance."

In the circumstances here a simple lottery is a sensible method of choosing among qualified applicants (those meeting minimal, threshold standards),[23] but an even better mechanism would be an auction among such applicants. An auction combines the simplicity of the lottery with two additional virtues: one, it would allow the public to recoup the economic value of the benefits conferred upon private licensees;[24] two, unlike a lottery an

[23] *Cf.* Anthony, *supra*, at 71-72 who proposes the use of a lottery between applicants who score evenly under this fixed point system. Chairman Wiley has also endorsed this means of selecting an applicant whose basic qualifications have otherwise been established. *Broadcasting*, March 29, 1976, p. 24. There are precedents for the use of a lottery in government allocation of resources. One notable example is the use of lotteries by the Bureau of Reclamation for a brief time after World War II in order to distribute land and water rights on federal lands. The lotteries usually were subject to veterans' preferences and there were also qualifications imposed on land recipients.

[24] This merit commends the use of a pricing mechanism generally regardless of whether competing applications have been filed. We do, of course, already have a system of modest license fees, but these only defray the FCC's cost of licensing, not the value of the spectrum right conveyed to the licensee. While a general user fee system has great merit, its implementation raises questions beyond those discussed here. See *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336 (1974). I am interested in the problem of finding a mechanism for choice among competing applicants; recapture of resource value is a quite distinct, and rather more complicated, question.

auction measures the intensity of individual preferences, in accordance with the prevalent standard for allocating resources in our economic system.[25]

Auctioning frequencies is not, of course a new idea[26] though it could not be said to have a wide following. I concede that for the Commission to implement an auction scheme would push its present legislative powers to the limits; nevertheless, administrative action to implement some such scheme cannot be dismissed out of hand.[27] Legal consider-[446]ations aside, however, pro-

[25] This particular virtue of the pricing mechanism has special importance here since it would permit those who have an intense desire to operate a station, for social as well as economic reasons, to express that intensity in bidding for a license. A lottery does not permit this.

[26] The seminal exposition of the idea is that of economist Ronald Coase, *The Federal Communications Commission*, 2 J. Law & Econ., 1 (1959). Subsequent discussions have extended the same idea to allocation of frequency rights more generally. See, *e.g.*, Coase, *The Interdepartment Radio Advisory Committee*, 5 J. Law & Econ. 17 (1962); De Vany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal Economic-Engineering Study*, 21 Stan. L. Rev. 1499 (1969). See generally, H. Levin, *The Invisible Resource* (1971).

[27] The courts have said that competing applicants must be comparatively evaluated in order to find the one "best" fitted to serve the public interest. See, *e.g.*, *Johnson Broadcasting Co.* v. *FCC*, 175 F.2d 351 (D.C. Cir. 1949); *Citizens Communications Center, supra.* (But see Judge Levanthal's dissent in *Star Television, Inc., supra*). See generally, Anthony, *supra*, at 75-84. On the other hand, the courts have also told us that our legislative powers are broad and flexible. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). Without supposing this constitutes authority to do anything we want, I would be bold enough to interpret this mandate to permit us to scrap the comparative hearing process and to substitute an auction system in its place. Hearings then would be limited to basic qualifications of applicants to bid. *Cf.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

posals to auction licenses to the highest bidder have been criticized on grounds of social policy. It is said, for example, that an auction (1) would be an abandonment of "public interest considerations," (2) could lead to the view that the winning bidder has a property right in the license, and (3) would favor the wealthy.[28] None of these objections seems to me compelling.

The first objection is a little vague but it seems to harbor both a misunderstanding of how the auction system would work as well as a misunderstanding of how the present system does work. An auction system need not, and in my proposal would not, eliminate all inquiry into licensee qualifications. I do not propose (nor do I know of any auction proponent who proposes) to waive minimum standards of fitness or eligibility for anyone who comes in with enough cash. On the contrary, only those applicants who meet the basic legal and character qualifications for licensees would be eligible to bid. Thus, under any circumstances, successful bidders at auction would be at least as well qualified as licensees whose applications are uncontested. When all is said and done, that is all we can realistically expect from the comparative hearing process also. The idea that comparative hearings really select out the "best" candidate is naive. Seldom is there any single "best" candidate; more often than not, the candidates are, for all practicable purposes, fungible. In any case, history shows that the comparative process,

[28] See *e.g.*, Anthony, *supra*, at 100-101. I once harbored similar views, see *supra* note 20. The objections now seem to me so very weak, I am hard pressed to explain how I embraced them. The only explanation that comes to mind is that of Dr. Samuel Johnson in explaining an error in his celebrated dictionary. Asked by a woman horse fancier how he came to define "pastern" as the knee of a horse, Johnson replied, "Ignorance, Madam, pure ignorance."

despite adjustments made in it over the years, is not designed to discover "the best," and even where the best may be selected there is no mechanism (other than the general rule against trafficking)[29] which prevents the winner from ultimately selling out to a less qualified candidate.[30]

As to the second objection, that an auction would lend credence to the view that licenses are a property right, it is sufficient to respond that such a property right does in fact exist as a consequence of the historic practice of renewing licenses except for misbehavior. To pretend otherwise is to blink reality. What needs to be considered is, what follows once we recognize this reality? I believe what follows is a reconsideration of the basis on which such property rights are acquired, and it is this that leads me to the proposed auction.[31]

[29] Under 47 C.F.R. Section 1.597, a transfer within three years raises a *prima facie* case of trafficking warranting a hearing, but waivers are so numerous they almost swallow the rule.

[30] In considering a proposed assignment of license or transfer of control, the Commission may not consider whether the public interest would be better served by someone other than the proposed assignee/transferee before the Commission. 47 U.S.C. Section 310(b); *Ron Campbell*, 58 FCC 2d 208 (1976).

[31] I do not propose an auction at renewal. On the premise that the licensee has a property right (defeasible only for misbehavior) an auction is pointless. With regard to licensees who purchased their rights at auction the government would, of course, already have recouped the value of the right in the initial auction, and any other person who wanted the license could do precisely what is done today: buy it directly from the licensee. As for existing licensees, as a concession to administrative practicability as well as political acceptability, I would simply vest *de jure* the rights they have *de facto*.

I do not suggest, however, that the process of renewal should be terminated, though the present three-year renewal cycle seems

[footnote continued]

[447] Finally, the objection that an auction would favor rich over poor, hardly seems a decisive objection since the same can be said of any pricing system.[32] Why is it, for example, any more pertinent to broadcast licenses than land or mineral leases or the use of dialysis machines?[33] In any case, it is indulging fantasy to pretend that an open pricing system would lead to greater control of licenses by the rich than does the present system, given the current expense of obtaining a license, particularly in the context of a comparative hearing. Anyone who believes that the comparative hearing process is available to everyone regardless of wealth must also be willing to believe in Santa Claus.[34] Indeed, it is not a

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to me inefficient and ineffective. On the premise that the licensee would continue to have public service responsibilities (such responsibilities would, of course, affect the purchase price but they are not necessarily inconsistent with an auction system), I see some merit in a periodic scrutiny of performance. Enforcement of such responsibilities need not be greatly different from what it is today – such as it is.

[32]It should, of course, be noted that this does not mean that the poor are necessarily excluded. As Professor Coase, *supra*, 2 J. Law & Econ. at 19-20 has pointed out, it is not simply the ability to pay but the *willingness* to pay that dictates how resources are distributed by the pricing system, and the willingness to pay is a function of the intensity of a buyer's preferences as well as of his wealth.

[33]Of course, as in the case of dialysis machines, society may provide the funds with which to purchase needed goods and services. So too with broadcast licenses, it may be desirable to provide a special subsidy to certain groups to enable them to bid for broadcast frequencies. This could be done in a variety of familiar ways: loans, loan guarantees, special assistance grants, etc. Such a system would be far more effective in helping disadvantaged groups than the present administrative scheme of "merits," "preferences" and pretense.

[34]A rough idea of what it costs to participate in a contested proceeding can be obtained from the *WPIX-TV* comparative re-

[footnote continued]

great exaggeration to describe the comparative hearing process as, in effect, a bidding system, except that money goes not to the owner of the resource, the public, but to lawyers representing the contestants.[35] As a practical matter the poor are excluded from the present system far more effectively than they would be from an auction system, because of the difficulties of raising the capital necessary to engage in such an uncertain venture as applying, and competing, for a license. Given the profitability of broadcast stations, lending institutions are ordinarily well disposed to advance the requisite capital to buy a station, or even to build it once a clear license grant has been made. One need not be wealthy to obtain such financial support, because the security for it lies in the relatively low-risk, and high-profit character of the enterprise. The real problem lies in raising the capital necessary *to compete* for a contested license, a high-risk, low profit[36] enterprise. It is in this latter respect that the present system most effectively screens out the poor. This is quite senseless as well as discriminatory: the risk capital is required not because of the risks inherent in

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newal case where costs of some $2 million were reportedly incurred by the challenging applicant and $1.5 million incurred by the incumbent just to proceed through the initial hearing stage. *Broadcasting*, Apr. 7, 1975, pp. 73-74. This case went through an extensive hearing before an ALJ, but has not yet done the entire appellate route to the Commission and the Court of Appeals. Plainly, litigation on this scale is not a pastime for the poor.

[35]Indeed, given the tax deduction for attorneys fees, the public owner ends up paying to "sell" its frequency rights!

[36]I use the phrase low profit to characterize the returns competition for a contested license because, if anyone can enter the competition, entry will continue as long as the expected returns to the next possible applicant are positive. Thus we would expect competition between applicants to drive returns on investment in license competition down to the norm for similar enterprises elsewhere in the economy.

the enterprise itself but because of risks in an artificial licensing process which shows no demonstrable relationship to superior performance or public service in the operation of the station.

While there are modestly hopeful signs of increased support for some form of auction system,[37] the day of its acceptance by the Com-[448]mission, the Court or Congress, still seems distant. Prevailing myths and ancient prejudices conspire with simple lassitude against any such "radical" reform. In the end, too many people find it too comfortable to stay with the old ways, bad as they are, rather than to chart a new and uncertain course full of imagined perils:

". . . in the night, imagining some fear
How easy is bush supposed a bear."

Shakespeare, "A Midsummer Night's Dream," V, i., 21-22.

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[37] Lest it be supposed that support for the auction proposal is confined to conservative economists in the "Chicago" tradition, I note that the basic idea has been endorsed by (among others), Professor Paul Samuelson, *Economics*, 480 (8th ed. 1970) and a similar user-fee system by Senator William Proxmire, *Broadcasting*, May 7, 1973, p. 47. See also Congressman Henry Reuss' proposal in 1958 to require the Commission to establish basic threshold qualifications of competing applicants and, in the event of a tie, to award the license to the highest bidder. See H.R. 11893, 85th Cong., 2d Sess. (1958).

APPENDIX G

[953]

F.C.C. 77-1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Applications of	:	
COWLES FLORIDA BROADCASTING, INC. (WESH-TV), DAYTONA BEACH, FLORIDA	:	Docket No. 19168 File No. BRCT-354
For renewal of license	:	
COWLES FLORIDA BROADCASTING (WESH-TV), DAYTONA BEACH, FLORIDA	:	Docket No. 19169 File No. BPCT-4158
For modification of authorized facilities	:	
CENTRAL FLORIDA ENTERPRISES, INC., DAYTONA BEACH, FLORIDA	:	Docket No. 19170 File No. BPCT-4346
For a construction permit	:	

MEMORANDUM OPINION AND ORDER

(Adopted: January 3, 1977; Released: January 4, 1977)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS DISSENTING; COMMISSIONERS FOGARTY AND WHITE NOT PARTICIPATING.

1. We have before us a petition for reconsideration of that part of our decision in *Cowles Florida Broadcasting, Inc. (WESH-TV)*, 60 FCC 2d 372 (1976), denying the above-referenced modification application (File No. BPCT-4158), filed August 19, 1976 by Cowles Florida Broadcasting, Inc. (WESH-TV), hereinafter "Cowles". Also before us are: (a) oppositions to the petition for reconsideration, filed September 8, 1976, by Central Florida Enterprises, Inc. ("Central") and by the Chief, Broadcast Bureau; (b) Cowles' reply to oppositions, filed September 27, 1976; (c) Cowles' supplement to petition for reconsideration, filed November 29, 1976; (d) Central's motion to strike unauthorized pleading filed December 3, 1976; (e) Cowles' opposition to motion to strike unauthorized pleading, filed December 7, 1976; and (f) the Broadcast Bureau's comments on supplement to petition for reconsideration, filed December 8, 1976.

[954] 2. The background of the findings and conclusions respecting the engineering issues in this proceeding (including the applicants' arguments under those issues) is discussed thoroughly in pars. 27 to 42 of the decision, and will not be repeated here. For the same reason, we will not set out the lengthy discussion in pars. 43 to 51 of the decision wherein we concluded that Cowles should not be permitted to amend its modification application to reflect a proposed antenna height increase (par. 43)

and that Judge Naumowicz had not erred in denying Cowles' modification application. We believe the reasons for denying Cowles' modification application were sound, and to the extent Cowles merely reiterates arguments which have already been rejected, such arguments will not be considered. Reconsideration will not be granted to permit reargument of matters which have already been considered and resolved. *WWIZ, Inc.*, 37 FCC 685 (1964).

3. Cowles claims two new circumstances justify reconsideration. The first of these is the issuance of our *Report and Order* amending the rules to establish a new methodology for calculating field strength curves. 53 FCC 2d 855 (1975). The *Report and Order* was issued after oral argument herein, and Cowles argues this changed circumstance warrants reconsideration. Cowles also cites the Review Board's decision in *KTVO, Inc.*, 57 FCC 2d 260 (1975), in which the Board stated that, in its opinion, the *Report and Order* indicates the new propagation curves are an improved allocations tool to be used in all proceedings not yet finally determined.

4. Cowles claims that by applying the new field strength curves, WESH-TV's city-grade service contours would be substantially changed. Under the old methodology, we found WESH-TV did not serve 6% of Daytona Beach with city-grade service. (Decision, par. 48.) Cowles contends that when the new field strength curves are used, contours in general shrink, with the result that WESH-TV's city-grade contour fails to cover 22% of Daytona Beach. Cowles then argues it can no longer be assumed that the lack of coverage is "only minimal," as we concluded in our decision.

5. The adoption of new field strength curves does not justify reconsideration for several reasons. Cowles itself

concedes it did not raise the city-grade service argument at the beginning of the proceeding, a point noted in our decision. Nor does the subsequent issuance of the *Report and Order* change this, because if Cowles believed its present arguments had merit, these arguments should have been raised long ago. The *Report and Order* was released on June 27, 1976, was published in the Federal Register on July 1, 1975 (40 Fed. Reg. 27671) and the amended rules became effective August 1, 1975. Moreover, we specifically pointed out in the *Report and Order* that we did not think the preparation of revised television contour maps would be particularly onerous (53 FCC 2d at 863-4), a judgment which appears to be confirmed by this case.[1] Cowles' limp explanation for its untimeliness (i.e., its speculation that the Broadcast Bureau and Central would have objected to employing the new curves on the ground it was too late to [955] raise this matter) is totally unpersuasive. If it was too late then, it is certainly much too late now to raise this argument after the final decision.[2] *Valley Telecasting Co. v. FCC,* 336 F.2d 914 (1964). Finally, we note Central has timely sought judicial review of our decision. We agree with Central that if

[1] Our decision was released July 20, 1976, and Cowles' present petition was filed August 19, 1976. While the supporting engineering affidavit annexed to the petition for reconsideration is not dated, the affidavit of the engineer who prepared this data (including contour maps prepared under the new curves) is dated August 12, 1976. It thus appears Cowles was able to assemble the data it now offers in less than thirty days.

[2] Regardless of what the new curves may show, those curves are inapplicable here because we specifically stated in the *Report and Order* that contours determined under the old methodology were "grandfathered." 53 FCC 2d 862. And even if, as Cowles claims, an Orlando station provides better service to Daytona Beach than WESH-TV does, this is totally irrelevant, because this argument is completely outside the designated issues.

we were to grant Cowles' modification at this late stage, this would give Cowles an unjustified comparative advantage.

6. The second ground which is said to justify reconsideration is the alleged existence of skywave or co-channel interference to WESH-TV's signal. In our view, no extended discussion of this ground is necessary, because Cowles itself concedes "this problem was not brought out at hearing because the designated issues, as framed, did not cover it." Cowles argues that improvements in the signals of competing Orlando stations have high-lighted the defects in WESH-TV's signal and make such defect appear "relatively" worse. It is apparent to us that such interference is not of recent origin, because to become relatively "worse," some degree of interference must have existed at the outset. But Cowles offers no explanation of why, if it considered this matter serious and one beyond the designated issues, it did not seek enlargement of the issues earlier, rather than waiting until after the final decision was released to raise it. We agree with Central and the Bureau that Cowles' attempt to raise this issue now comes far too late and does not serve as a basis for reconsideration. An applicant cannot wait until a final decision is issued and then seek to interject issues which would have been raised at an earlier stage of the proceedings. *Valley Telecasting Co., supra.*[3]

[3] Our judgment is not altered by the support which one of the two time-share licensees of Channel 2, Miami, Florida has given to Cowles' application to change transmitter site. (Cowles' supplement to petition for reconsideration.) Any lessening of short-spacing which would result from the co-channel station's proposal to change transmitter site is outweighed by the considerations discussed herein and in our Decision.

7. On our own motion, we next consider two additional matters which in our judgment require clarification: (1) the meaning to be placed on the Commission's use of the word "superior" in describing Cowle's past programming, and (2) the weight to be accorded the preference awarded Central under the diversification factor.

8. With respect to past programming, we stated that the performance of WESH-TV was "superior" and thus entitled to "a plus of major significance" within the meaning of *Citizens Communications Center v. FCC*, 145 U.S.App.D.C. 32, 447 F.2d 1201 (1971). We are now concerned that use of the term "superior" without elucidation may have conveyed a meaning other than that intended.

9. Our use of this term was meant to indicate that the level of service provided by WESH-TV was sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal. Our intent to apply the term "superior" to service which was solid and favorable (as opposed to service which is truly "exceptional" or of the highest possible level) was initially set forth more than five years ago.[4] In order to avoid a possibility of confusion, however, we [956] propose to use the term "substantial" hereafter to characterize the sort of performance evidenced by this record. In using the word "superior" we were, in effect, distinguishing between two situations – one where the licensee has served the public interest but in the least permissible fashion still sufficient to be renewed in the absence of competing applications, and the other where the licensee had done so in a solid, favorable fashion. As the Court suggested in *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1970) *cert. denied*, 403 U.S. 923 (1971), a renewal applicant with a "sound" or "favorable" record is entitled to special consideration in a comparative proceeding even though this record might not be so far above the average as to be "exceptional" in nature. We believe that such "legitimate renewal expectancies" are clearly "implicit in the structure of the Act." 143 U.S. App. D.C. at 396, 444 F.2d at 854.[5]

[4] *Further Notice of Inquiry in Docket 19154*, 31 FCC 2d 443, 444 and notes 1 and 2 (1971).

10. Thus, our use of the term superior was not meant to convey the impression that our conclusion turned upon a finding that WESH-TV's past programming was exceptional when compared to other broadcast stations in its service area or elsewhere. We did not mean to use the word in this comparative sense.

11. We also believe it appropriate to revisit our discussion of the diversification factor. On that issue we found that Central was entitled to a "clear preference" over Cowles. Our use of the term "clear" was not intended to indicate any view on the issue of how much

[5] There the Court stated that such expectancies:

> are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security.

143 U.S. App. D.C. at 400, 444 F.2d at 858. The Court reaffirmed the concept of renewal expectancies in *Alianza Federal de Mercedes v. FCC*, — U.S. App. D.C. —, — and n.9, 539 F.2d 732, 736 and n.9 (1976). In the *Citizens* case, the Court recognized that the absence of legitimate renewal expectancies would pose a threat to the public interest, although it spoke in terms of a "superior" performance whereas the Court in *Greater Boston* referred to a "sound" or "favorable" record. *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. at 44, n.35, 447 F.2d at 1213, n.35.

weight should attach to Central's preference. On that issue we concluded that a variety of factors reduced the significance of the preference. Foremost among them was our finding that Cowles had no ownership interest in any other mass media outlet in Daytona Beach, or the remainder of WESH-TV's service area. Cowles' other broadcast and newspaper interests proved to be remote from Daytona Beach and were shown not to dominate in even those markets. Elsewhere our decision noted that Cowles had accorded WESH-TV's local management team substantial autonomy in its operations. While our decision did not discuss the impact of this local autonomy upon diversification we wish to make it clear now that this factor did serve to further diminish the preference accorded Central. *Fidelity Television, Inc. v. FCC,* 169 U.S. App. D.C. 225, 242-3 and 246, 515 F.2d 684, 701-2 and 705 (1975).

12. For these reasons, we specifically rejected Central's contention that its preference on the diversification issue was "compelling." We went on to state that Central's preference on this issue was outweighted by Cowles' distinct preference on the factor of best practicable service to the public. We did not, however, specifically articulate the weight to which Central's diversification preference was entitled. We believe that it would serve the public interest for us to do so here.

13. In our view the nature and management of Cowles' other mass [957] media interests, and most especially their remoteness from Daytona Beach, is such as to have no adverse effect upon the flow of information to those persons in WESH-TV's service area. We can find no evidence in the record that the dangers of concentration, which we have characterized as any national or other uniform expression of political, economic, or social opinion, exist in this case. Accordingly, we find the preference awarded Central on diversification to be of little decisional significance.[6]

14. This conclusions fully squares with both judicial and agency precedent. In *Fidelity Television, Inc. v. FCC, supra,* the Court of Appeals for the District of Columbia Circuit affirmed our decision to renew the license of a Los Angeles television station whose parent owned mass media outlets in other parts of the country, as in the case before us, but also held other broadcast licenses in the Los Angeles area. In so doing the Court left undisturbed our conclusion that even in view of the more significant degree of concentration present in that case, there was no adverse effect upon the flow of information to the audience served by the incumbent licensee. Clearly the Court's decision in *Fidelity* dictates no different result under the circumstances present here.

15. Similarly there is no evidence contained in the record which would dictate a different result under Commission policy. We have consistently stated that it is not our policy to restructure the broadcast industry through the diversification criteria employed in comparative hearings. In the context where we found consideration of such restructuring appropriate – a formal rulemaking – we determined that even in those cases where daily newspapers and broadcast stations in the same market were

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[6] We also recognized that Black ownership increased Central's advantage under this and the integration of ownership and management criteria. However, as we later discussed, that ownership was relatively small and therefore of diminished importance. In other words, while Central's Black ownership and lack of other media interests was to be accorded some weight, it did not outweigh Cowles' distinct preference under the best practicable service criteria.

commonly owned, divestiture was unwarranted except in a specified number of egregious cases. *Second Report & Order in Docket 18110,* 50 FCC 2d 1046, 1078-1086 (1975), *appeal pending sub nom., National Citizens Committee for Broadcasting v. FCC,* D.C. Cir. No. 75-1064.

16. Finally, the *1965 Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965), which does discuss the weighting of various factors under diversification, was intended only to govern applications for new facilities and did not purport to deal with the problems present where, as here, an applicant was seeking a license which was the subject of a renewal proceeding.[7] Even if the *Policy Statement* did apply, our reasoning here would stand. In that document we said that we would consider other mass media interests of an applicant against the following schedule:

> Other interests in the principal community proposed to be served will normally be of most significance, followed by other media interests in the remainder of the proposed service area and finally, generally in the United States. 1 FCC 2d at 394-5 (1965).

[958] 17. As we have made clear, Cowles' other media interests all fall within the third category – "generally in the United States" – which is entitled to least significance. Given this fact and the nature and location of the

[7] We have held, however, that the *Policy Statement* governs the introduction of evidence in a renewal proceeding. *Seven (7) League Productions, Inc.,* 1 FCC 2d 1597, 1598-9 (1965), *cited in Fidelity Television, Inc. v. FCC, supra,* 169 U.S. App. D.C. at 240, n.27, 515 F.2d at 699, n.27. The *Policy Statement* did not address the weight to be accorded the legitimate renewal expectancies of the incumbent licensee, or for that matter, the relative significance of other comparative considerations.

interests here in question, our finding that Cowles' other media holdings were of little decisional significance in this case was entirely proper.

18. Our conclusions in this regard do not mean – or suggest – that a challenger is denied an opportunity to show that a grant of his application will better serve the public interest. They do mean that a challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent. The Commission – and the Court – have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance – i.e. sound, favorable – is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.

19. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed August 19, 1976 by Cowles Florida Broadcasting, Inc. (WESH-TV), IS DENIED.

20. IT IS FURTHER ORDERED, That the motion to strike unauthorized pleading, filed December 3, 1976, by Central Florida Enterprises, Inc. IS DENIED.

21. And, IT IS FURTHER ORDERED, That our decision styled *Cowles Florida Broadcasting, Inc.* (WESH-

TV), 60 FCC 2d 372 (1976), is clarified to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, *Secretary*.

CONCURRING STATEMENT OF CHAIRMAN RICHARD E. WILEY IN DOCKET NOS. 19168, 19169 AND 19170

The standard by which a renewal applicant's performance is to be judged, in order to "reasonably expect renewal" in the context of a comparative hearing, has not been altogether clear. In its original opinion, the majority adopted the requirement of "superior service" as set forth in dictum in *Citizens Communications Center v. FCC.*[1] I dissented to this determination on the grounds that WESH-TV's service, while "thoroughly adequate" so as to justify renewal under any rational renewal system, was simply not "superior". On reconsideration, the majority now articulates the required standard of service as "solid and favorable" (as opposed to superior in terms of exceptional or of the highest possible level). This standard, as the majority points out, is [959] consistent with expressions of the Court of Appeals in *Greater Boston Television Corp. v. FCC.*[2]

[1] 145 U.S. App. D.C. 32, 44 & n.35, 447 F.2d 1201, 1213 & n.35 (1971).

[2] There, the court opined that the "renewal expectancies inherent in the structure of the Act" possibly would have been interfered with if the Commission had concluded that a licensee were to receive a "predicate for renewal" only upon a finding that its past record had been "exceptional" rather than "sound or 'favorable' ". 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1970).

As indicated, I did not – and do not now – find Cowles' service to be superior (in the sense of exceptional). However, I did – and do now – find that service to be sufficiently substantial (in the sense of solid and favorable) to warrant renewal. Accordingly, given the majority's clarification of intent, I find myself able to concur in this matter.

However, it has been clear to me for a long time that this entire area demands Congressional action. As I have stated many times before, I do not believe that the present comparative renewal process makes sense. Accordingly, I and my fellow Commissioners have recommended to Congress that it be abolished.[3] In the continuing absence of such legislation, however, I believe that the time has come for the FCC to issue a new policy statement which will provide interim clarification (within the limitations of our authority). Hopefully, such a statement will provide some guidance in this complex and difficult area to licensees, challengers, Administrative Law Judges and, most importantly, the public at large.

[3] *Report of the Federal Communications Commission to the Congress of the United States Re the Comparative Renewal Process (1976).*

APPENDIX H — B —

FCC 77-446
70507

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
COWLES BROADCASTING, INC. (WESH-TV)	)	Docket No. 19168 File No. BRCT-354
For Renewal of License	)	
COWLES BROADCASTING, INC. (WESH-TV) Daytona Beach, Florida	)	Docket No. 19169 File No. BPCT-4158
For Modification of Authorized Facilities	)	
CENTRAL FLORIDA ENTERPRISES, INC.	)	Docket No. 19170 File No. BPCT-4346
For Construction Permit	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1977;
Released: June 30, 1977

By the Commission: Chairman Wiley concurring and issuing a statement; Commissioner Hooks dissenting; Commissioners Fogarty and White not participating.

1. By Memorandum Opinion and Order, FCC 77-1, released January 4, 1977, we denied the petition of Cowles Broadcasting, Inc. (Cowles) for partial reconsideration of our Decision in *Cowles Florida Broadcasting,*

Inc., 60 FCC2d 372 (1976). At that time we also clarified, *sua sponte,* (a) the meaning to be placed on our use of the word "superior" in describing Cowles' past programming, and (b) the weight to be accorded the preference awarded Central Florida Enterprises, Inc. (Central) under the diversification factor. Now before us are a petition for reconsideration of that Memorandum Opinion and Order, filed February 3, 1977 by the Citizens Communications Center (Citizens), National Black Media Coalition (NBMC), and National Citizens Committee for Broadcasting (NCCB), and the responsive pleadings listed below.[1]

2. We consider first petitioners' standing to seek reconsideration. Petitioners are not parties to these proceedings and evidenced no interest therein until the release of our clarifying Memorandum Opinion and Order, *supra,* hereinafter referred to as FCC 77-1. In support of their right to seek reconsideration, petitioners state that they are non-profit organizations with a substantial interest in the Commission's policies both in comparative and non-comparative renewal situations. Additionally, NBMC contends it is interested in promoting the entry of Blacks into broadcasting, and NCCB is interested in assuring FCC policies which will promote maximum feasible diversification of mass media ownership. While Citizens takes no position on whether the grant of Cowles' renewal application should stand,[2] it contends the new general

[1] Comments of Central Florida Enterprises, Inc., filed February 16, 1977; motion to strike, filed February 16, 1977 by Chief, Broadcast Bureau; petitioners' response to motion to strike and Central's comments, filed March 1, 1977; petition for late acceptance and opposition to petition for reconsideration, filed March 2, 1977 by Cowles Broadcasting, Inc.; Cowles' comments on response of petitioners, filed March 9, 1977; and petitioners' reply to opposition to petition for reconsideration, filed March 11, 1977.

[2] NBMC and NCCB do not make a similar representation.

policy embodied in FCC 77-1 will undermine the efficacy of our comparative renewal processes, our multiple ownership policies, our minority ownership policies, and our standards for integration of management and ownership.

3. All three parties to these proceedings – Cowles, Central and the Broadcast Bureau – oppose petitioners' efforts to intervene at this late stage. They refer, *inter alia*, to the tardiness of the petition, the vagueness of petitioners' claims they will be aggrieved by a denial of intervention, and the discretionary nature of granting intervention rights to non-parties. In its comments, Central suggests the petition be considered as an informal complaint. The Broadcast Bureau considers the petition so defective that it has filed a motion to strike that pleading.[3]

4. In our judgment, petitioners do not have standing to intervene in these proceedings, and their efforts to do so come far too late. *Valley Telecasting Co. v. FCC*, 188 U.S. App. D.C. 410, 336 F.2d 914 (1964). Nevertheless, we will consider the merits of petitioners' objections to FCC 77-1. We do so because we recognize that in FCC 77-1 we did announce policies of general applicability to comparative renewal proceedings. See our reference to FCC 77-1 in Par. 24 of the recently adopted *Report and Order* in Docket 19154, FCC 77-204, released April 7, 1977.

5. In our judgment, developments occurring after the filing of the pleadings herein have rendered petitioners'

[3]The Broadcast Bureau's motion to strike will be denied. In that motion, the Bureau requests that it be permitted an opportunity to comment on the merits of the petition in the event its motion is denied. That request will also be denied.

first argument substantially moot. In their first argument, petitioners complain that our treatment in FCC 77-1 of an incumbent's past broadcast record is confused and subjective. The argument here rests on the fact that in our original *Decision* (60 FCC2d 372), a majority of the Commission concluded Cowles' past broadcast record was "superior", but in clarifying what we meant by "superior" in FCC 77-1, the Commission substituted an applicable standard of "substantial", by which we meant that WESH-TV's past record was ". . . sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." (FCC 77-1, Par. 9). The concerns that prompted this clarification are fully explained in Pars. 8-10 of FCC 77-1, and our clarification was intended to dispel any notion that only service which was ". . . truly 'exceptional' or of the highest possible level" (FCC 77-1, Par. 9) entitled an incumbent to renewal against the challenge of a newcomer.

6. After professing to find much confusion in this approach and after conceding they have ". . . no real quarrel with the Commission's use of 'substantial' as the [applicable] test", petitioners then offer what they perceive as a solution to the standards under which an incumbent's past broadcast record should be judged. Petitioners argue a key factor in deciding whether an incumbent's past record is sufficiently substantial to justify renewal is the percentage of time an incumbent devotes to serving as a local outlet and to contributing to an informed electorate. Then, taking note of the then-pending rulemaking in Docket 19154, they argue the only proper course for the Commission to follow is to adopt ". . . percentage guidelines for measuring a licensee's past meritorious service." (Petition, p. 8). This, in petitioners' view, is the only ". . . sensible, objective or law-

ful course open to the Commission" in view of the critical nature of an incumbent's past record (of which programming is the essense), the alleged undesirability of taking quantitative percentages into account on an *ad hoc* basis, and the desirability – given First Amendment considerations – of examining a past record under objective standards. (Petition, pp. 8-10). Petitioners then urge that the rulemaking in Docket 19154 be completed, and that this case be reconsidered by the standards enunciated therein.

7. In the *Report and Order* in Docket 19154 (released after petitioners filed their pleadings) we discussed at length the pros and cons of adopting quantitative standards for establishing what constitutes "substantial program service" by a broadcast renewal applicant involved in a comparative hearing. After considering testimony and extensive comments in the proceeding, we concluded after careful analysis that such standards constituted ". . . a simplistic, superficial approach to a complex problem"[4], and their adoption would not serve the public interest.

8. We agree with Central and Cowles that petitioners' attempt to use this proceeding as a means of concluding the rulemaking in Docket 19154 is entirely unwarranted. The development of standards which are fair to both an incumbent licensee and a challenger in a renewal/new applicant proceeding is a difficult task, as even petitioners agree. But for the reasons stated in the *Report and Order* in Docket 19154, we have determined that such renewal proceedings will continue to be decided on an *ad hoc*

[4]Par. 21, *Report and Order*, FCC 77-204, released April 7, 1977. Commissioner Hooks and Fogarty issuing a separate statement, Commissioner Quello concurring and issuing a separate statement.

basis, until such time as the Congress acts on our legislative recommendation that comparative renewal hearings be eliminated. In this connection, we note NBMC and NCCB participated in the rulemaking, and Citizens played the key role in obtaining reversal of the Commission's 1970 Comparative Renewal Policy Statement, 22 FCC2d 424 (1970). Any continuing concern which petitioners might have in the matter of adopting quantitative standards should be confined to review proceedings which might be undertaken with respect to Docket 19154. In short, the termination of the rulemaking in Docket 19154 gives the petitioners as much as they are entitled to seek – a decision on the merits of the proposal to adopt quantitative standards.[5] But irrespective of whether they agree with that decision, that extraneous matter should not be interjected into this comparative case, which has already, as Central plaintively notes, gone on too long.

9. In their second argument, petitioners contend that in FCC 77-1, we adopted and elevated erroneous concepts of "remoteness" and "autonomy" in our treatment of the diversification factor. In revisiting the diversification factor in FCC 77-1, we explained in detail why, in the particular circumstances of this case, the preference awarded Central on diversification was of little decisional significance. See Pars. 11 to 17, FCC 77-1. We see no point in repeating that discussion at length here, beyond noting that our treatment of the diversification factor was specifically based on both judicial and agency precedent.

[5]Our refusal to adopt quantitative standards in Docket 19154 renders moot petitioner's request that this case be reconsidered under such standards.

10. In our judgment, the contentions which petitioners make in their second argument are either erroneous because they ignore applicable precedent, or are based on speculation involving fact situations not present here. For example, while petitioners first contend our holding respecting autonomy has no support in logic, precedent, or the statutory scheme, they recognize (Petition, Fn. 11) that in FCC 77-1, we relied on *Fidelity Television, Inc. v. FCC,* 169 U.S. App. D.C. 225, 242-3 and 246, 515 F.2d 684, 701-2 and 705 (1975). That case specifically supports our treatment of the "autonomy" and "remoteness" factors under the diversification criterion, and thus does provide precedential support. We think petitioners' real quarrel is not so much with our decision as it is with the *Fidelity* case, because petitioners – one of whom (Citizens) filed as *amicus curiae* in support of rehearing or clarification in the *Fidelity* case – candidly admit they ". . . think the Court was mistaken in *Fidelity* even in the 1973 context." But petitioners' disagreement with the *Fidelity* case does not render our reliance thereon erroneous.

11. Petitioners further claim our treatment of "autonomy" and "remoteness" has skewed the diversification criterion and undermined our multiple ownership rules and the policy of fostering Black ownership of stations. We cannot agree with this contention. To begin with, our treatment of the concepts of "remoteness" and "autonomy" as they bore on the diversification factor occurred in the context of a comparative renewal proceeding. For the reasons stated in FCC 77-1, we believe that treatment is correct. Thus, petitioners indulge in unwarranted speculation when they argue FCC 77-1, threatens to undermine the diversification policy in other

contexts. However, even in contexts other than a comparative renewal proceeding, "remoteness" and "autonomy" still remain relevant, and in each case, the weight to be accorded these factors under the diversification factor would depend on the particular facts involved. See Pars. 16 and 17, FCC 77-1. But assigning the proper weight to the diversification criterion in factually variable contexts does not "undermine" the importance of diversification, as petitioners erroneously contend. Rather, this weighing process merely underscores the fact that the decisional significance of the diversification factor necessarily varies with the facts.

12. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration, filed February 3, 1977 by Citizens Communications Center, Nation Black Media Coalition, and National Citizens Committee for Broadcasting IS DENIED.

13. IT IS FURTHER ORDERED, That the petition for late acceptance, filed March 2, 1977 by Cowles Broadcasting, Inc. IS GRANTED.

14. IT IS FURTHER ORDERED, That, the motion to strike the petition for reconsideration, filed February 16, 1977 by Chief, Broadcast Bureau, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Vincent J. Mullins
Secretary

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*See attached concurring statement of Chairman Wiley.

CONCURRING STATEMENT OF CHAIRMAN RICHARD E. WILEY RE: DAYTONA BEACH COMPARATIVE PROCEEDINGS

* * *

This case has proved to be one of the most difficult I have had to decide in my years on the Commission. And, in truth, the call remains an exceedingly close one. As the record will show, my first vote was to dissent on the ground that "a grant of renewal would be inconsistent with the law as I understand it." By this, I meant that renewal could not be justified under the standard which the majority apparently had employed.[1] In this same opinion, however, I also expressed the view that – under a proper renewal policy – Cowles should not be denied its license.

In its opinion on reconsideration, the Commission majority articulated and applied a comparative renewal standard with which I strongly agree, and one under which I believe that the renewal of Cowles' license can be fully justified.[2] Accordingly, I concurred in the result reached in that opinion. I continue to believe, however, that serious difficulties are involved in any attempt to compare an incumbent licensee with a challenger. For this reason, I advocate the abolition of the entire com-

[1] Under this standard, credit could be given for an incumbent's past performance only in cases of "superior service." See *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 44 and n.35, 447 F.2d 1201, 1213 and n.35 (1971).

[2] Under this standard, a preference could be awarded for "substantial" past performance. As the majority pointed out, this formulation was consistent with the court's statement in *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F.2d 841, 854 (1970).

parative renewal process – a reform which the Commission previously has recommended to Congress.[3]

[3] *Report of the Federal Communications Commission to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce (of the House of Representatives) Re the Comparative Renewal Process*, September 20, 1976.

APPENDIX I

ALLOCATION OF FACILITIES: TERM OF LICENSES

* * *

Sec. 307 (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular

classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

* * *

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

Supreme Court, U. S.
FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1400

COWLES BROADCASTING, INC. and
COWLES COMMUNICATIONS, INC.,

Petitioners,

v.

CENTRAL FLORIDA ENTERPRISES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATUTORY PROVISIONS INVOLVED

In addition to the provisions mentioned by Petitioners,[1] Sections 307(b), 308(b), 309(a), and 309(e) of the Communications Act of 1934, as amended, are pertinent to this proceeding.[2]

[1] Petitioners' Brief, p. 3, fn. 2 and 3. See Appendix I to Petition For A Writ Of Certiorari, pp. 312a, 313a.

[2] See attached Appendix at 1a.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Are there involved issues of such national or Constitutional consequence requiring the intervention of this Court where:

(1) There is no disharmony between the Court of Appeals decision under review and any decision of this Court;

(2) The Court of Appeals decision under review properly concluded that a Commission conclusion of affirmative public interest finding warranting grant of Petitioners' application for renewal of license of Television Station WESH-TV, Daytona Beach, Florida, could not be reconciled with the record developed after the Commission's own designation of two sets of issues relating to basic character qualifications of Petitioners for retention of license. The Commission made findings and conclusions adverse to Petitioners on issues relating to move of the WESH-TV main studios from its required location in the Daytona Beach area 70 miles southward to the Orlando area in search of more lucrative profits in violation of Commission rule and in violation of a Commission directive that WESH-TV could not change its main studio location to relocate in the Orlando area. Further, in such a record as was developed, the Commission also made findings and reached conclusions adverse to Petitioners in consequence of magazine circulation practices "rife"[3] with fraudulent conduct on a massive basis implicating Petitioner Cowles Communications, Inc.;[4]

[3]This is the description used by the Presiding Officer. See Appendix E to Petition For A Writ Of Certiorari at p. 128a.

[4]Central complained and the Court of Appeals agreed that the Commission did not afford Central adequate opportunity to develop a full record on these issues. See Appendix A to Petition For A Writ Of Certiorari, pp. 25a-26a.

(3) Not withstanding concerns of Petitioners to the contrary,[5] the Court Decision under review holds only that in this particular case the Commission must follow its own articulated standards[6] rather than fashioning a result-oriented decision favorable to the WESH-TV incumbent.

COUNTERSTATEMENT OF THE CASE

The Peitioners' Statement of the Case is not in proper context and in some respects is somewhat distortive and misleading. A counterstatement is appropriate.[7]

On October 31, 1969, Cowles Florida Broadcasting, Inc., then a subsidiary of Cowles Communications, Inc.,[8] tendered its application for renewal of license of Television Station WESH-TV in the public interest. Under applicable statutes,[9] an applicant for renewal of a television license must make an affirmative showing to warrant a Commission determination that grant of its application will be in the public interest, convenience, and necessity.

[5]Petitioners' Brief, p. 3.

[6]See Appendix C to Petition For A Writ Of Certiorari, p. 52a.

[7]We note that Peitioners seem to have no essential quarrel with the Court of Appeals' description of the course of the litigation (See Appendix A to Petition For A Writ Of Certiorari at pp. 8a-19a).

[8]Central submits that, contrary to the representations made by Petitioners (Brief for Petitioners, p. 4, fn. 4), more was involved than mere change of articles of incorporation when the licensee name of WESH-TV was changed to Cowles Broadcasting, Inc. While this will not be pursued at present, it is not a representation which Respondent views with uncritical acceptance.

[9]Sections 308(b) and 309(a) of the Communications Act of 1934, as amended.

On January 2, 1970, Respondent Central Florida Enterprises, Inc. filed with the Commission a competing application wherein Central sought to dislodge the absentee owned Cowles media complex[10] as the controlling operator of WESH-TV. A full comparative renewal hearing was required between Central and WESH-TV.[11]

Of course, the Communications Act and the *Ashbacker* precedent of this Court require a comparison between applicants in the Commission licensing selection process. However, there were unusual factors present here which ought to be mentioned and which might very well escape the notice of this Court were it to adopt in fact and in context the Petitioners' Statement of the Case.[12]

The Commission is required by law to enforce the regulatory scheme which implements its own rules and regulations.[13] The Commission is empowered by law to require applicants to make a showing sufficient to assure that they possess the requisite character qualifications to be or to retain licenses[14] to be "fiduciaries"[15] of

[10]There are numerous media interests attributable to the Cowles media complex. The Administrative Law Judge, the Commission and the Court so found. See Appendix A, pp. 11a-13a and 26a-30a; Appendix B, p. 43a; Appendix E, pp. 106a-108a and 132a-133a; Appendix F, pp. 180a-181a.

[11]*Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945); *Citizens Communications Center v. Federal Communications Commission*, 447 F.2d 1201 (1971).

[12]Hence, notwithstanding Petitioners' representation (Brief, p. 4), this comparative renewal is "typical" only in the sense that in accordance with time-honored practice, the Commission preferred the incumbent over the challenger (See Appendix C, pp. 51a-52a and fn. 19-23 to Petition For A Writ Of Certiorari).

[13]*Service v. Dulles*, 354 U.S. 362 (1957).

[14]Sections 308(b) and 309(e) of the Communications Act of 1934, as amended, fn. 9, *supra*.

[15]See *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (1966).

the public. Where the Commission believes that questions are raised about threshold character qualifications, the Commission may designate appropriate issues. If issues relating to basic qualifications are resolved adversely to an applicant, the proceeding may end there without any comparison of a competing applicant.[16] The Petitioners' Statement of the Case is significant for its egregious failure to take this principle into account except in passing.[17] The failure of Peitioners to have made a showing on designated issues relating to basic character qualifications could have disqualified Petitioners and the Commission evaluation process could have come to an end as long as Central was qualified.[18] The Commission proceedings could have come to an end even if Central were not qualified. There were two separate braces of character issues designated against Petitioners. Each will be discussed in turn.

Respondent Central, a Daytona Beach based citizens group, filed a competing application because Petitioner WESH-TV had virtually abandoned its required main studio license location in the Daytona Beach Area for a more lucrative and unauthorized location in the Orlando Area, some 70 miles south.[19] The Commission desig-

[16]*Guinan Realty Co. v. Federal Communications Commission*, 297 F.2d 782 (1961).

[17]Petitioners Brief, pp. 4-5.

[18]Central was qualified. Petitioners have not suggested, either in this Court, or in the Court of Appeals, that Central is not qualified.

[19]As counsel for Central has pointed out at oral argument before the Commission, this can be analogous to a situation in which a Commission licensee moved the main studio of a Washington television station to a location north of Baltimore in violation of Commission Rules to garner more revenues. FCC Docket No. 19168 et al., Tr. 4648-4649.

nated issues relating to the basic character qualifications of Petitioners to retain the license of WESH-TV in light of the serious allegations made.[20]

Petitioners, we submit, have incorrectly advanced to the Court spurious claims for preference for location of the so-called WESH-TV "auxiliary studios"[21] in the Orlando Area. Findings and conclusions made by the Administrative Law Judge,[22] the Commission,[23] and the Court of Appeals[24] were uniformly adverse to Petitioners in holding that the *main* studio location—*not* the "auxiliary" studios—of WESH-TV was in the Orlando Area. In fact, while the Administrative Law Judge expressly gave credit to Respondent under the comparative—as contrasted to the qualifying issues[25]—for proposed use of studios in the Orlando Area, the Commission properly excluded any such claimed preference by WESH-TV in light of the overwhelming indications that the main

[20]See Issues 2(d) and 2(f) in the Commission Hearing Designation Order, 36 Federal Register 4901. For the language of these issues, see Appendix E, pp. 57a-58a to the Petition For A Writ Of Certiorari. Evidence adduced under these issues was considered under the comparative evaluation as well.

[21]Petitioners Brief, p. 4.

[22]Appendix E, pp. 77a-86a, 122a-128a to the Petition For A Writ of Certiorari.

[23]Appendix E, pp. 172a-175a, 185a-194a to the Petition For A Writ of Certiorari.

[24]Appendix A, pp. 9a-10a, 23a-25a.

[25]Qualifying issues are those which relate, *vel non*, to basic eligibility; comparative issues are those which assess qualified applicants under criteria established by the Commission. Evidence adduced under qualifying issues may be considered under comparative issues as well.

studios of WESH-TV were consciously relocated in the Orlando Area.[26]

Further, while it is not an important point, *per se*, we submit that Petitioners advance another spurious argument to this Court in claiming that Respondent Central should be faulted for electing not to introduce evidence concerning proposed programming at hearings before the Commission. The plain fact is that such evidence would have been excluded. Petitioners unsuccessfully sought—twice[27]—to obtain from the Commission's Review Board a so-called "diminution of service" issue which would have required programming comparisons. Petitioners had claimed preference for use of their "auxiliary" studios in the Orlando Beach area; by contrast, at least according to Petitioners, Central's proposal to have a single studio located at Daytona Beach would result in loss of a transmission service.[28] In denying this motion the first time, the Review Board had reminded Petitioners that the primary obligation of WESH-TV programming was to the Daytona Beach—not the Orlando—Area. Indeed, the Review Board pointedly reminded Respondent of a 1960 pronouncement relating to WESH-TV itself that while the station could identify itself as "Daytona Beach-Orlando", there should be no misunderstanding

[26]Compare Appendix E, p. 137a with Appendix F, pp. 226a-227a and Appendix A, p. 24a-25a.

[27]*Cowles Florida Broadcasting, Inc.*, 31 FCC 2d 458, 22 RR 2d 868 (1971); *Cowles Florida Broadcasting, Inc.*, 35 FCC 2d 228, 24 RR 2d 573 (1972).

[28]The distinction between "transmission service" and "reception service" will be explained separately, Respondent's Brief, *infra*, p. 15.

of the Commission action granting that request, as indicated by the following:[29]

> "It should be emphasized that grant of your request for waiver does *not* modify your license, change your station location as specified in your license, or change your obligations to your principal city, Daytona Beach, in any way."

Respondent Central has initially and consistently represented that its principal purpose in seeking to displace Petitioners is to return the WESH-TV main studio to the area of the station's required city of license, Daytona Beach. The unsuccessful requests of WESH-TV to claim for credit emphasis on programming to Orlando reinforce the validity of Respondent Central's position.

In another representation improperly advanced to this Court, Petitioners attempt to downplay comparative disabilities of attributable media ownership.[30] This representation not only distorts the importance given by the Court of Appeals to the criterion of diversification of mass media of communications in this case, it is a surprising disregard by an experienced broadcaster for Commission precedent[31] which uniformly disallows any attempts by applicants in comparative hearings to improve their positions by removing or alleviating comparative disability through disposing of attributable media interests after initiation of hearing process by the Commission.

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[29] *Cowles Florida Broadcasting, Inc.*, 22 RR 2d 868 at 872-873.

[30] Petitioners Brief, p. 5, fn. 6.

[31] *Azalea Corp.* 38 FCC 2d 95, 25 RR 2d 975 (1972); *Triple C Broadcasting Corporation*, 12 FCC 2d 503, 12 RR 2d 1008 (1968); *News-Sun Broadcasting Co.*, 24 FCC 2d 770, 19 RR 2d 942 (1970).

Petitioners' characterizations of the evaluations made by the Administrative Law Judge, the Commission, and the Court of Appeals are disquietingly—but by now, predictably—imprecise. Contrary to the Petitioners' assertions,[32] Respondent Central prevailed on every single comparative criterion of consequence: local ownership, integration of ownership and management, lack of affiliation with mass media of communication, main studio move, and "mail fraud" issues. On the issues related to Petitioners' basic character qualifications—inexplicably included in Petitioners' Statement of the Case as among ". . . [N]umerous other subsidiary issues [which] were raised . . ."[33]—the Court of Appeals took due cognizance of the result oriented agency process which has historically and consistently preferred an incumbent over a challenger. Ultimately, the Commission had preferred Cowles, relying in part on "administrative feel." On review of the record as a whole, and with particularized references to conclusions evaluated by the Commission, the Court of Appeals simply could not reconcile the Commission process in this case with requirements of the law and the record developed by the Commission itself.[34]

On reconsideration requested by the Commission, the Court of Appeals took great care to show[35] that there

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[32] Petitioners Brief, pp. 4-7.

[33] Compare Petitioners Brief, pp. 4-5 to the language of the issues designated as issues 2(d), 2(e) and 2(f) of the Initial Decision, Appendix E, pp. 57a-58a, to the Petition For A Writ Of Certiorari.

[34] See Appendix A, pp. 1a-38a to Petition For A Writ Of Certiorari.

[35] See Appendices B-D, pp. 39a-53a to Petition For A Writ Of Certiorari.

is no disharmony whatsoever between its decision in this case and the decision of this Court in the *NCCB* case.[36]

In sum, we submit the Petitioners' claims that there have been legal and factual errors of national importance requiring the extraordinary remedy of intervention by this Court are premised upon a Statement of the Case which is flawed and imprecise. This Counterstatement of the Case provides a more appropriate backdrop against which to weigh Petitioners' request for the extraordinary relief sought.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO DISHARMONY BETWEEN THE COURT OF APPEALS DECISION UNDER REVIEW AND THE DECISION OF THIS COURT IN NCCB WHICH REQUIRES INTERVENTION OF THIS COURT

Petitioners posit a claim of fundamental conflict between the Court of Appeals Decision under review and the *NCCB* decision. For the reasons which follow, we submit that Petitioners err. There is no conflict with *NCCB* presented. At the outset, we note that the Commission has not sought *certiorari* in this case. Hence, the Commission must be presumed to have concluded that the Court of Appeals pronouncements issued in January 1979 have removed any substantial conflict which the Commission believed may have existed between the Court of Appeals pronouncements in this case[37] and *NCCB*.

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[36] *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[37] If, in the unlikely event that the Commission believes that Petitioners' Request For A Writ Of Certiorari should be granted, simple fairness to the Respondent Central dictates that this Court seek from the Commission reasons why the Commission itself did not seek *certiorari*.

[footnote continued]

There was no reason for the Court of Appeals to reconcile its reasoning in this licensing case with the *NCCB* decision of this Court. Argument in this case took place before a panel of the Court of Appeals on June 6, 1978. The *NCCB* case was decided June 12, 1978. The Commission's General Counsel, by letter,[38] advised the Court of Appeals of issuance of this Court's decision in the *NCCB* case. The Court of Appeals was perfectly aware of the *NCCB* decision. The Court of Appeals did not set reargument or require the filing of memoranda from the parties concerning the implications of the *NCCB* decision. Thus, when the Court of Appeals issued its opinion in this case on September 25, 1978, the Court made no mention of the *NCCB* decision because none was required. When the Commission and Petitioners here both filed Petitions for Reconsideration and Suggestion for Rehearing En Banc, the Court of Appeals, expressing surprise that this *single* case had caused such considerable reverberations as were claimed upon the broadcasting industry,[39] expressly reconciled its decision with this Court's rationale in the *NCCB* case.[40] Petitioners cannot be heard to complain.

The factual situation presented to this Court in the *NCCB* case was entirely different from that at issue here. In *NCCB*, the Court reviewed rather sweeping appellate

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[38] The date of the letter is June 19, 1978.

[39] See Appendix C, pp. 51a-52a to Petition For A Writ Of Certiorari.

[40] See Appendix B, pp. 42a-43a to Petition For A Writ Of Certiorari.

court determinations involving divestiture, *vel non*, of all colocated newspaper-television combinations in the United States. While this Court, in *NCCB*, could not agree that total divestiture of colocated television-newspaper combinations was warranted, the Court did sustain the Commission's determination that divestiture in 16 colocated newspaper-broadcast ownership combinations was required[41] because of "egregious" circumstances. In the *NCCB* decision the Court did sustain a prospective Commission rule barring cross-ownership of newspaper-television combinations.[42]

Notwithstanding Petitioners' arguments, the *NCCB* decision of this Court did not abrogate the right of Respondent to seek a full hearing required by statute[43] and this Court's landmark decision in the *Ashbacker* case. Indeed, this Court in *NCCB* cited with approval[44] the Court of Appeals decision in the *Citizens* case,[45] which struck down protectionist standards of the Commission in comparative renewal proceedings and which reaffirmed that *Ashbacker* rights do apply to the comparative renewal process. In so doing, the Court observed that, after issuance of the *Citizens* decision, the Commission had adopted new policies to apply to the comparative

[41] Some of these situations involved cross-ownership of newspapers and radio stations.

[42] This Court, in *NCCB* also sustained a Commission determination to "grandfather" existing colocated newspaper-televison combinations other than the "egregious" sixteen.

[43] Section 309(e) of the Communications Act, as amended.

[44] *NCCB, supra*, at pp. 782-783, fn. 5.

[45] *Citizens Communications Center v. Federal Communications Commission*, 447 F.2d 1201 (1971).

hearing process involving renewal applicants[46] and that these 1977 FCC standards were being subjected to judicial review in the Court of Appeals in a then pending proceeding, the *NBMC* case.[47] What Petitioners fail to point out is that upon judicial review of the Commission's 1977 policies in *NBMC*, the Court of Appeals could find no difference between the Commission 1977 comparative renewal policies and those 1970 protectionist policies which the Court of Appeals had struck down as contrary to *Ashbacker* in the *Citizens* case. In *NBMC*, the Court of Appeals affirmed the Commission only insofar as the Commission refused to adopt minimal percentages of nonentertainment public interest types of programming as standards in assessing whether or not a television license ought to be renewed.[48]

We note that the Commission did not seek Court of Appeals reconsideration of the *NBMC* decision nor did the Commission request *certiorari* in that case.[49] The *NBMC* case is still law. The *NCCB* case neither abrogates nor diminishes in any way the right of a challenger to a full *Ashbacker* hearing. This is the standard by which the Court of Appeals judged the hearing case under review and it remains the standard in which the Court of Appeals properly found the Commission's process legally defective and the Petitioners' showing underwhelming.

[46] *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, 66 FCC 2d 419 (1977).

[47] *National Black Media Coalition v. Federal Communications Commission*, 589 F.2d 578 (1978); *NCCB, supra*, at pp. 806-808.

[48] See *NBMC, supra*, at 589 F.2d 578 (1978); See Appendix A to Petition For Writ Of Certiorari, pp. 22a-23a, fn. 61-64.

[49] Neither did any of the several television licensees and/or industry organizations which intervened in that case.

Despite assumptions to the contrary, *NCCB* recognizes and reaffirms that broadcasters do not have an unabridgeable First Amendment right to speak or publish.[50] The Commission acts well within its public interest responsibilities in concluding that benefit to the public interest can follow from allocation of broadcast licenses so as to promote diversification of mass media as a whole.[51] *NCCB* reaffirmed decisions of this Court which hold that the public interest standard necessarily invites reference to First Amendment principles;[52] that traditionally, there is a First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources;[53] and, as a logical extension of this doctrine, that, because of the physical scarcity of broadcast signals, it is the First Amendment right of viewers and listeners to be informed which is paramount, not the right of broadcasters.[54]

In *NCCB*, this Court recognized that consistent with law there may be legitimate expectancies created in licensees. However, *nowhere* did the reasoning of this Court extend that expectancy to a television station which moves its main studio 70 miles in direct contravention of a Commission rule designed to implement the statutory scheme and a specific Commission directive advising the very station involved that its obligations to the Daytona Beach Area were paramount.

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[50] *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

[51] *NCCB, supra*, at p. 795.

[52] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

[53] *Associated Press v. United States*, 326 U.S. 1, at 20 (1945).

[54] *Red Lion, supra.*

Under Section 307(b) of the Communications Act of 1934, as amended, the Commission is required by Congress to assign broadcast facilities among the various states and communities when and insofar as there is demand for the same on a fair efficient and equitable basis. Broadcasting service consists of "transmission service", the availability of a station to serve as a local outlet for expression on varying subjects relating to news, public affairs, and programming of interest to the area immediate to license location; and "reception service", the ability to deliver an acceptable signal to its entire area of license. The ratification of an acknowledged move of a main studio more than 70 miles away for profit in derogation of the rule implementing the statutory scheme to diversify transmission outlets creates a frightening spectre concerning "expectancies". If violations of rules and adverse findings on issues and evidence relating to basic character qualifications are treated with such indifference, the result reached will not only contravene Respondent's due process rights, it will be in derogation of the Daytona Beach Area's First Amendment rights to a local transmission outlet under *Red Lion*.

While Petitioners have expounded greatly about "meritorious" service of WESH-TV, the record before the Commission and the Court documents no such claim. *Ipse dixit* statements will not suffice. Further, such claims about "meritorious" service have to be seriously suspect in light of the virtual abandonment of the main studio in the area of the required city of license,[55] a matter of such importance as to warrant Commission designation of a basic character issue against WESH-TV

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[55] As the Review Board held, *twice*, fn. 27, *supra*, WESH-TV had a primary responsibility to serve the Daytona Beach Area.

and findings adverse to WESH-TV which were not overcome by any countervailing showing of consequence.

II.

THE COURT OF APPEALS MADE NO SERIOUS ERRORS OF LAW OR FACT

Petitioners' arguments, to the extent they have not been addressed before,[56] are unavailing. No error requiring intervention of this Court has been shown in regard to the observations of the Court of Appeals about "common officers" and the curtailment of inquiry on the "mail fraud" issues. Indeed, the presentation of Petitioners is not without considerable circularity. On the one hand, Petitioners allege that the Commission has fully discussed these matters. In virtually the next breath, Petitioners state that Respondent Central has raised them too late. Unsurprisingly, these contradictory claims are unsupported by any claim or citation to Petitioners' Appendix. We submit that the Court has acted properly.[57] The Commission was less than thorough. In short, the Petitioners would stand on its head the long established axiom that licensees are expected to be law abiding.

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[56]Petitioners Brief, pp. 17-19. Three arguments were advanced here: (1) inconsistency with the *NCCB* decision; (2) misreading of rights guaranteed by the comparative renewal process and FCC interpretations and findings concerning its main studio rule; (3) misreading of the record concerning "mail fraud" issues. Only (3) will be addressed here, since (1) and (2) have already been discussed.

[57]See Appendix A, pp. 25a-26a.

III.

THE COURT OF APPEALS HAS NOT ATTEMPTED TO OBFUSCATE INCONSISTENCIES, NOR HAS THE COURT LEFT IN UTTER CONFUSION EITHER THE COMMISSION'S PUBLIC INTEREST STANDARD, OR THE OBLIGATIONS AND RENEWAL EXPECTANCIES OF ALL INCUMBENT BROADCAST LICENSEES, OR THE APPROPRIATE ACTION FOR PETITIONERS

The last line of Petitioners argument, if it may be termed such, is overdrawn, overbroad, and somewhat pejorative. If there are confusing and ambiguous descriptions relating to the WESH-TV broadcast record, they come from various and conflicting pronouncements of the Commission conveniently tailored to each situation involving a challenger and a renewal applicant and are not fashioned by any Court of Appeals decision.

The Commission's statutory standard is set forth in *Ashbacker* requiring full hearing on all issues of fundamental public interest importance. All the Commission has to do is follow *Ashbacker* and its own articulated standards. Another result oriented process will not do. The "chilling" effect on the practical exercise of the right of the public to engage in the comparative renewal process is obvious; no challenger has so much as filed to displace a television renewal applicant for more than four years. No challenger has ever displaced a renewal applicant in the comparative process.

Petitioners claim industry-wide uncertainty, an argument that is patently overdrawn.[58] Statistically, as the Court of Appeals has found, valid renewal expectancies persist for television licensees. However, a licensee

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[58]Compare Appendix C, pp. 51a-52a, to Petition for A Writ of Certiorari.

would be well advised to avoid moving its main studios 70 miles. A licensee would do well to avoid being implicated in business practices "rife" with fraud. Television licensees cannot seriously argue that a requirement of noninvolvement in improper practices raises a nonforeseeable standard of conduct which cannot be met.[59] A licensee must be more than a profit center for its owner. It should also be mentioned, though it hardly need be, that mail fraud is a crime of moral turpitude. It is not asking too much of users of scarce natural resources that they be expected to avoid and refrain from such conduct if they desire to remain licensees. After all, no one has ever *required* anyone to get into and stay in the broadcasting profession.

A Commission which claims the right to maintain standards of "industry stability" while condoning such egregious transgressions of its own policies and standards cannot receive the sanction of a Court of law. The public is entitled to an "industry stability" which eschews fraud and abandonment of the required location of a station.

April 12, 1979

[59] *Yale Broadcasting v. Federal Communications Commission*, 478 F.2d 594 (1973).

CONCLUSION

The Petition For a Writ Of Certiorari must be denied.

Respectfully submitted,

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APPENDIX

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RELEVANT STATUTORY PROVISIONS INVOLVED

47 U.S.C. § 307(b):

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. § 308(b):

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each applicant filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(e):

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Supreme Court, U. S.
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No. 78-1400

In the Supreme Court of the United States

OCTOBER TERM, 1978

COWLES BROADCASTING, INC. and COWLES COMMUNICATIONS, INC., PETITIONERS

v.

CENTRAL FLORIDA ENTERPRISES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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1. This case arises from a comparative hearing conducted by the Federal Communications Commission to consider two mutually exclusive applications to operate a television station in Daytona Beach, Florida. Petitioner, Cowles Broadcasting, Inc. (CBI), the current licensee, sought renewal of its license.[1] Respondent, Central Florida Enterprises, Inc. (Central), applied for a construction permit to build and operate a new station on the same channel. After weighing the advantages of preserving the incumbent's past proven services to the community against the possibility of

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[1]The other petitioner, Cowles Communications, Inc. (CCI), is the parent of the wholly owned subsidiary, CBI. CCI is also affiliated with various media interests in other parts of the United States (Pet. App. 180a).

increasing media diversification by granting the license to the challenger, the Commission concluded that the public interest would best be served by continuing the existing service.[2] It therefore granted CBI's application and denied that of Central (Pet. App. 140a-301a).[3]

2. The court of appeals reversed and remanded. It directed the Commission to reassess the question whether CBI possesses the minimum qualifications needed to retain the license.[4] It also concluded that the Commission had denied the challenger a fair comparative hearing by holding that an incumbent's "substantial" service record justifies renewal without due regard for traditional comparative criteria or, in the alternative, had improperly weighed "substantial" past performance "as a plus [factor] of major significance" in its comparative analysis (Pet. App. 36a-37a). Finally, the court concluded that the Commission had "seriously undercut the utility of the diversification criterion" by giving the benefits of diversification inadequate consideration in the present proceeding (*id.* at 28a).

The court of appeals subsequently amended its original opinion and issued a supplemental per curiam opinion (Pet. App. 39a-53a). The court acknowledged in its amended and supplemental opinions that

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[2]Before the Commission reached the issue of comparative benefits, it resolved certain preliminary qualifying issues in favor of CBI (Pet. App. 185a-270a).

[3]The Commission's decision affirmed in all pertinent respects the conclusions of the Administrative Law Judge (Pet. App. 54a-138a).

[4]The court held that the Commission must reconsider its finding that there was no connection between CBI and another CCI subsidiary that had been involved in a mail fraud scheme (Pet. App. 25a-26a). The court also directed the Commission to reassess its leniency toward CBI's unauthorized move of its main studio, in violation of a Commission rule (*id.* at 23a-25a).

Commission recognition of renewal expectancies stemming from an incumbent licensee's past record of "substantial" or "meritorious" service (as well as past "superior" service) is compatible with the full hearing requirement of Section 309(e) of the Communications Act of 1934, 47 U.S.C. 309(e) (Pet. App. 40a-43a, 48a-49a). The court further explained that in its former opinion it had objected only to the "manner" in which the Commission analyzed the diversification of media ownership issue, and had not intended to specify the weight that the Commission must attach to the goal of diversification in a comparative renewal hearing (*id.* at 43a).

3. The court's amended opinion properly revised portions of the initial opinion that, in our judgment, were erroneous. Although we still believe that the Commission's disposition of the comparative issues in this case should have been affirmed,[5] we understand the court's revised opinion, together with its supplemental per curiam opinion, as a directive to provide a more complete analysis, and not as a bar to the exercise of the discretion granted to the Commission under the Federal Communications Act.

The Commission, on remand, is neither denied its lawful discretion to determine what significance to attach to media diversification in the comparative renewal hearing, nor prohibited from taking into account the incumbent's meritorious past service record. A meritorious past record, the court pointed out, may afford the incumbent licensee a natural

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[5]In its petition for rehearing and suggestion for rehearing en banc, the Commission did not contest the court's remand of the mail fraud issue (Pet. App. 25a-26a). While the Commission did contest the remand of the unauthorized studio move issue (*id.* at 23a-25a), that issue, by itself, is not important enough to call for this Court's review.

advantage over the challenger in terms of predicting future performance because the challenger's "paper promises" of performance are often less credible (Pet. App. 40a). With respect to the question whether a past favorable record may be treated as a factor in the incumbent's favor, regardless of its predictive value, the court acknowledged that this result (urged by the Commission) at least appeared to be "plausible" under the public interest standard (*id.* at 48a-49a). Thus, the court left the Commission broad latitude to give appropriate weight to the renewal expectancies of the incumbent licensee (*id.* at 50a-51a). Review by this Court at this time is not necessary to permit the Commission to discharge its comparative renewal licensing responsibilities.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1979

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